Supreme Court, U.S.
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No. 94-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE STATE OF OKLAHOMA,
Petitioner,

v.

PONCA TRIBE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act seeks to involve the States in the regulation of Indian gaming. To achieve this goal the Act (1) requires that States negotiate in good faith when a Tribe requests that the State enter into a gaming compact and (2) uses the Federal district courts to compel the States to compact. In light of these provisions, the questions presented are:

I.

Whether Congress, in regulating Indian gaming under the Indian Commerce Clause, is empowered to abrogate the States' Eleventh Amendment Immunity, not in order to subject the State to regulation, but to use the Federal district courts as a means of coercing the States to act as regulators of Indian gaming?

II.

Are the States' sovereign contracting rights -- rights reserved to the States by the Tenth Amendment -- violated by the Indian Gaming Regulatory Act which:

a) Dictates that the States shall negotiate Indian gaming compacts;

b) Dictates how and when the States will negotiate;

c) Authorizes Tribes to sue a State in Federal district court on claims that the State has failed to negotiate in good faith;

d) Authorizes the Federal district courts, upon a finding of a lack of good faith, to require the State to complete a compact, submit to mediation, and submit a compact -- its last best offer -- to the mediator; and

e) Authorizes the Secretary of Interior, when all other court-imposed remedies fail, to dictate the regulatory obligations of the States?

PARTIES TO THE PROCEEDINGS

The Petitioner in this Court is the State of Oklahoma.

The Respondent in this Court, who was plaintiff below, is the Ponca Tribe of Oklahoma.

Although neither the United States nor any of its agencies is a party, the provisions of 28 U.S.C. § 2403(a) may be applicable, as the constitutionality of an Act of Congress has been called into question. Neither the district court nor the Court of Appeals certified to the Attorney General that an Act of Congress was drawn into question. In accordance with the provisions of Rule 29, this Petition is being served on the Solicitor General.

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OCTOBER TERM, 1994

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PONCA TRIBE OF OKLAHOMA,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

The State of Oklahoma respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Petitioner's Appendix ("Pet. App.") at 1a - 38a and is reported at ____ F.3rd ____ (10th Cir.1994). The district court's Order on motion to dismiss is reproduced in the Appendix at 43a - 54a and is reported at 834 F.Supp. 1341 (W.D.Okla.1992).

STATEMENT OF JURISDICTION

The judgement and opinion of the Court of Appeals were entered on September 2, 1994. Pet. App. 1a. On October 27, 1994, the Court of Appeals denied the State's petition for rehearing and suggestion for rehearing *en banc*. Pet. App. 41a, and on October 28, 1994, issued amendments to its previous decision. Pet. App. 39a - 40a. The petition for certiorari is being filed within 90 days of that denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3:

> The Congress shall have Power...to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. amend. X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATUTES

Section 2710(d)(7) of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, in pertinent part provides:

> (7)(A) The United States district courts shall have jurisdiction over--
>
> > (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith....
>
> (B)(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period....
>
> (iv) If a State and Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

Section 2710(d), the portion of the statute most relevant to this case, is reprinted in full in the Appendix at pages 55a - 64a.

STATEMENT OF THE CASE

This case brings before the Court important issues which go to the heart of our Federal system of government, and involve: (a) the Federal government's power to abrogate the States' Eleventh Amendment Immunity as a

means of acquiring the States' aid in regulating Indian gaming, and (b) the Federal government's power to interfere with the States' reserve sovereign power to contract, a power this Court has specifically held is protected by the Tenth Amendment's reservation of powers to the States.[1]

The issues which this case brings before the Court arise out of Congress' enactment of the Indian Gaming Regulatory Act (the "Act" or "IGRA"), 25 U.S.C. § 2701, et seq.

A. The Indian Gaming Regulatory Act's Intent To Involve The States In The Regulation Of Indian Gaming.

In enacting IGRA, Congress, under specific circumstances, authorized Indian Tribes to engage in gaming on Indian land. However, Congress did not authorize Tribes on their own to engage in Class III Gaming, which includes such activities as lotteries, horse racing, slot machines, and casino table games.[2] Rather, to engage in such gaming, the Tribes must enter into a Tribal-State Compact with the States.[3]

---

[1]United States v. Bekins, 304 U.S. 27 (1938).

[2]S. Rep. No. 446, 100th Cong., 2d. Sess. at 3 and 7 (1988). IGRA divides gaming into three classes. Class I gaming involves social games played solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals in connection with tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Class II gaming involves certain kinds of bingo and similar games of chance as well as certain card games. 25 U.S.C. § 2703(7). Class III gaming includes all forms of gaming that do not fall within Class I or II. 25 U.S.C. § 2703(8).

[3]25 U.S.C. § 2710(d)(1). Pet. App. at 55a.

In deciding on the mechanism of a Tribal-State Compact for conducting Class III gaming, Congress noted that "there is no adequate Federal regulatory system in place for Class III gaming, nor do tribes h. e such systems for the regulation of Class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems...[which] can be accomplished through a negotiated compact." S. Rep. No. 100-446, 100th Cong. 2d. Sess., at 15 (1988). [Emphasis added].

Perhaps one of the better explanations of the need for State regulatory functions under a Tribal-State Compact was made by Representative Bilbray of Nevada, who spoke in support of the Act:

> Class III games are complex and easily corrupted without constant vigilance by trained and experienced regulators.
>
> Those States that now permit such gaming already have in place tested regulatory programs and trained programs.
>
> The expertise and experience these States have acquired over the years cannot be readily replicated by the Indian Tribes or by regulatory contractors to the tribes.
>
> A Federal commission would not have the money, manpower, or expertise necessary to regulate Class III games.
>
> . . . .
>
> The imposition of a State regulatory scheme on Class III games operated on Indian lands would enhance both the appearance and the fact of integrity in the operation of the games.

[Emphasis added]. Cong. Rec. H8157 (daily ed. Sept. 26, 1988) (statement of Rep. Bilbray).

It was because of the need for the expertise and experience of State regulators that the IGRA did not provide or even contemplate the conduct of Class III gaming in the absence of a Tribal-State Compact. As Senator Inouye (one of the chief Senate proponents of the Act) stated, "[the Act] does not contemplate and does not provide for the conduct of Class III gaming activities on Indian land in the absence of a Tribal-State Compact." (Emphasis added). Cong. Rec. S12650 (daily ed. Sept. 15, 1988) (statement of Sen. Inouye). Noting this, Senator Inouye further stated that Tribes who choose to engage in Class III gaming may only do so if a compact is in place:

> Under this provision, tribes that choose to engage in gaming may only do so if they work out a Tribal-State Compact with the state. Tribes that do not want any state jurisdiction on their land are precluded from operation of what the Bill refers to as Class III gaming.

(Emphasis added). Id.

B. The Tribal-State Compacting Mechanism And Its Use Of The Federal Courts.

Under IGRA, upon receiving a Tribe's request to compact, the State "shall negotiate with the Indians in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). Pet. App. at 58a.

If a State fails to negotiate with the Tribe, or fails to negotiate in good faith, the Tribe may bring an action in federal district court. 25 U.S.C. § 2710 (d)(7)(A)(i). Pet. App. at 60a - 61a. If the Court finds that the State has either refused to enter into negotiations, or has not negotiated in good faith, the Court "shall order the State

and the Indian Tribe to conclude a compact within a 60-day period." [Emphasis added]. 25 U.S.C. § 2710(d)(7)(B)(iii). Pet. App. at 61a.

If the State and the Tribe fail to conclude a Tribal-State Compact within the 60-day period, the Tribe and State "shall each submit to a mediator, appointed by the Court, a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of the Act and any other applicable Federal law." 25 U.S.C. § 2710(d)(7)(B)(iv). Pet. App. at 62a. At that point, the mediator appointed by the Court submits to both the State and the Indian Tribe the compact which he or she has selected. 25 U.S.C. § 2710(d)(7)(B)(v). Pet. App. at 62a.

If a State accepts the compact submitted by the mediator within sixty days after the mediator submits the proposed compacts to the State, that proposed compact is treated as the Tribal-State Compact. 25 U.S.C. § 2710(d)(7)(B)(vi). Pet. App. at 62a. If, on the other hand, the State does not consent to the compact selected by the mediator, the mediator notifies the Secretary of the Interior; the Secretary shall then, in consultation with the Tribe, establish the procedures -- "consistent with the proposed compact selected by the mediator, the provisions of the Act, and the relevant provisions of the laws of the State" -- under which Class III gaming may be conducted on the Indian land. 25 U.S.C. 2710(d)(7)(B)(vii). Pet. App. at 63a.

C. Trial Court Proceedings.

In the summer of 1992, the Ponca Tribe of Oklahoma sued the State of Oklahoma, and its Governor, David Walters, in both his individual and official capacity, alleging that the State had failed, as required under the Indian Gaming Regulatory Act, to negotiate a gaming

compact with the Tribe in good faith. The State of Oklahoma and Governor David Walters filed a Motion to Dismiss on the basis of both Eleventh Amendment Immunity from suit, and IGRA's unconstitutional interference with the State's sovereign contracting rights, in violation of the Tenth Amendment. The district court dismissed the Tribe's complaint concluding that the Tribe's action against the State and Governor Walters, in both his official and individual capacity, was barred by Eleventh Amendment Immunity. Pet. App. at 50a - 51a. The district court further concluded that the coercive provisions of IGRA also violated the State's Tenth Amendment sovereign contracting rights, holding that in enacting IGRA, Congress had crossed the line distinguishing encouragement from coercion. Pet. App. at 52a - 53a.

D. Proceedings In The Court Of Appeals.

The Ponca Tribe timely appealed from the district court's Order of dismissal to the Court of Appeals for the Tenth Circuit. In considering the appeal, the Court of Appeals decided the Ponca Tribe's appeal jointly with similar cases from New Mexico and Kansas[4], but did not consolidate the cases. Pet. App. at 6a.

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[4]The cases jointly considered with the Ponca Tribe are:

Pueblo of Sandia v. Bruce King, Governor, State of New Mexico; State of New Mexico; Case No. 93-2018

Mescalero Apache Tribe, The Reservation v. State of New Mexico; Bruce King, Governor of the State of New Mexico; Case No. 93-2020

Kickapoo Tribe, also known as Kickapoo Nation in Kansas of the Kickapoo reservation; Steve Cadue, tribal chairman of the Kickapoo Nation in Kansas; Prairie Band of Potawatomi Indians, a federal recognized tribe v. State of Kansas; Case No. 93-3110

The Court of Appeals held that under the Indian Commerce Clause's plenary powers, Congress could abrogate the States' Eleventh Amendment Immunities as it did in IGRA. Pet. App. at 24a. The Court of Appeals further held that the coercive provisions of IGRA, though more than a mere invitation to the States to consider negotiating with the Tribes, nevertheless did not violate the Tenth Amendment by impermissibly interfering with the State's sovereign contracting rights. Pet. App. at 35a. Finally, the court held that suits against the States' governors, or representatives of the States, were barred. Pet. App. at 36a - 37a.[5]

A timely joint petition of all of the States for rehearing and a suggestion for rehearing en banc was filed with the Court of Appeals, and the Court of Appeals on October 27, 1994, issued its Panel's Order denying rehearing, and at the same time the court denied the suggestion for rehearing en banc. Pet. App. at 41a.

The Panel also issued amendments to its opinion, correcting a misstatement of law, and adding additional material to one of its footnotes. Pet. App. at 39a - 40a.

On November 10, 1994, the Court of Appeals stayed the issuance of the mandate to the district courts pending the State's filing for writ of certiorari with this Court. Pet. App. at 42a.

REASONS FOR GRANTING THE WRIT

The Court's review is warranted because:

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[5]The discussion of the claims filed against the governors in all of the cases joined for consideration was lumped together, and in doing so, the Court of Appeals failed to take note of the fact that the Ponca Tribe, in its brief on the merits, chose not to address that issue, and thereby failed to preserve it.

1. The lower Federal courts, which now frequently address the issues presented, need this Court's guidance on the issues, particularly since there is a split in the circuits on the principal issue;

2. The Court of Appeals' holding that Congress is able to abrogate the States' Eleventh Amendment immunity in order to use the Federal courts as a means of compelling the States to regulate Indian Gaming, in the federal government's stead, conflicts with the teaching of Pennsylvania v. Union Gas and Fitzpatrick v. Bitzer;

3. The Court of Appeals' holding that the States' sovereign contracting rights were not violated by IGRA's use of the Federal courts to compel the States to negotiate and submit to mediation, and to authorize the Secretary of Interior to dictate the regulatory obligations of the State, conflicts with the teachings of New York v. United States, and;

4. Both issues are important questions of Federal law which profoundly affect the constitutional relationship among the States, the Indian Tribes and the Federal Government, and are issues which this Court should settle.

A. The Lower Federal Courts, Which Now Frequently Address The Issues Presented, Need This Court's Guidance On The Issues, Particularly Since There Is A Split In The Circuits On The Principal Issue.

The principal issue determined below was whether Congress is empowered to abrogate the State's sovereign immunity, as it did in IGRA, where it abrogated the States' immunity, not in order to subject the States to regulation, but to use the Federal district courts as a means of compelling the States to act as regulators of Indian gaming. The Court of Appeals for the Tenth Circuit held that Congress possessed such power, but in doing so recognized that the issue has "sharply divided the courts." Indeed, in

addition to the split on the question in various district courts[6],there is a clear split in the circuits on the issue.

In ruling that Congress, under the Indian Commerce Clause, had the power to abrogate the State's immunity as it did in IGRA, the Tenth Circuit Court of Appeals joins the Eighth and Ninth Circuits, which came to the same conclusion. Spokane Tribe of Indians v. Washington, 28 F.3d 991, 998 (9th Cir. 1994) (holding that the Eleventh Amendment did not render the State of Washington immune from suit under IGRA to "enforce the clear congressional mandate that states negotiate in good faith with tribes to reach tribal gaming compacts."), and Cheyenne River Sioux Tribe v. South Dakota, et al., 3 F.3d 273, 281 (8th Cir. 1993)(holding that Congress could abrogate the State's Eleventh Amendment Immunity under the Indian Commerce Clause).

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[6]Many federal district courts have addressed this issue, and in doing so, like the circuit courts, have split on the issue. E.g. Confederated Tribes of the Colville Reservation v. State of Washington, slip op. No. CS-92-0426-WFN (E.D. Wash. June 4, 1993) (State and State officers dismissed under Tenth and Eleventh Amendment), no appeal taken. Indeed, as the Court of Appeals noted in the case at hand, the district courts in the four cases joined for consideration "reach conflicting conclusions on the States' defenses." Pet. App. A-10 - A-11. In Ponca Tribe of Oklahoma v. Oklahoma, 834 F.Supp. 1341 (W.D. Okla. 1992), Pueblo of Sandia v. King, slip op. No. CIV-92-0613-JC (D.N.M. 1992), and Mescalero Apache Tribe v. New Mexico, slip op. No. CIV-92-076-CJ (D.N.M. 1992) the courts held that the Eleventh Amendment barred the Tribes suit because Congress lacked authority to abrogate the States' Eleventh Amendment Immunities. In Kickapoo Tribe of Indians v. Kansas, 818 F.Supp. 1423 (D. Kan. 1993), the district court came to a conflicting conclusion, ruling that Congress did not have the power to abrogate the States' Eleventh Amendment Immunities when it enacted IGRA. Also see, Blackfeet Tribe. v. Jessup, No. CV-93-031-GF-PGH, slip op. (D. Mont. 1993) (granted Motion to Dismiss on the Eleventh Amendment grounds, appeal docketed No. 94-35079) (9th Cir. 1994), and Fort Belnap Indian Community v. Montana, slip op. No. CV-92-98-GF-PGH (D. Mont. 1994) (granted Motion to Dismiss on Eleventh Amendment grounds, appeal docketed, No. 94-35126) (9th Cir. 1994).

In sharp contrast to the conclusion reached on this issue by the Eighth, Ninth and Tenth Circuits, the Eleventh Circuit, in Seminole Tribes of Florida v. Florida, 11 F.3d 1016 (11th Cir. 1994), held that "Congress did not possess the power to abrogate the states' Eleventh Amendment immunity when it enacted IGRA." 11 F.3d at 1028. The Eleventh Circuit Court of Appeals decision in Seminole Tribes of Florida v. Florida is in direct conflict with the decisions on the issues by the Eighth, Ninth and Tenth Circuits[7]. While it did not rule on the issue, the Court of Appeals for the Fifth Circuit recently recognized the existence of the split in the circuits on the issue. Ysleta del Sur Pueblo v. Texas, 36 F.3d 325, 332 (5th Cir. 1994) (dismissing Tribe's suit on other grounds).

Clearly the lower Federal courts need this Court's guidance on these issues, given that there is a split in the circuit courts, a split in the district courts, and an

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[7]No doubt the Ponca Tribe will argue that there was no real conflict between the decision of the Eleventh Circuit in Seminole Tribes of Florida v. Florida, and the conclusions reached by the Tenth Circuit in the case now before the Court, and in doing so will attempt to rely upon Part V of the Eleventh Circuit's Opinion. After concluding that Congress lacked the power to abrogate the States' Eleventh Amendment Immunities under the Indian Commerce Clause when it enacted IGRA, the Eleventh Circuit, in Part V of its decision, concluded that when a State fails to negotiate a gaming compact in good faith, and raises its Eleventh Amendment Immunity when sued under the provisions of IGRA, the tribes may at that point ask the Secretary of the Interior to directly prescribe the regulations noting Class III gaming. 11 F.3d at 1029. This erroneous conclusion of the Eleventh Circuit, which is being challenged by Florida and Alabama on appeal, does not alter the fact that there is a direct conflict on the Eleventh Amendment issue in the circuits. Under the Eleventh Circuit's ruling, the States are protected from having to defend themselves against charges of bad faith, and are further protected against a compulsory mediation process following a court's ruling on bad faith. On the other hand, under the rulings of the Eighth, Ninth and Tenth Circuits, the States will still be subject to suit in Federal court, will have to defend themselves against charges of bad faith, and may be ultimately subject to all of the enforcement provisions of IGRA, including compulsory mediation.

increasingly frequent appearance of the questions at both levels.

B. The Court of Appeals' Holding That Congress Is Able To Abrogate The States' Eleventh Amendment Immunity In Order To Use The Federal Courts As A Means Of Compelling The States To Regulate Indian Gaming, In The Federal Government's Stead, Conflicts With The Teachings Of Pennsylvania v. Union Gas and Fitzpatrick v. Bitzer.

In concluding that Congress was empowered to abrogate the States' sovereign immunity, the Court of Appeals' analysis was, to a large extent, based upon the plurality opinion in Pennsylvania v. Union Gas, 491 U.S. 1 (1989). Pet. App. at 18a - 24a. The Court of Appeals further held that in those instances when a court decides a case and "no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgement on the narrowest grounds...'". Pet. App. at 19a. The Court of Appeals then concluded that what was relevant to the abrogation analysis in both Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and Union Gas was "not just the subject matter of the constitutional provisions, but also whether the provisions bestowed plenary power to Congress to the exclusion of the states' authority in the field." Pet. App. at 21a.

After considering the plenary power bestowed by the Fourteenth Amendment (considered in Fitzpatrick) and the Interstate Commerce Clause (considered in Union Gas), the Court of Appeals concluded that because Congress enacted the Indian Gaming Regulatory Act pursuant to a plenary power, the analysis developed by this Court in both Union Gas and Fitzpatrick was equally applicable when Congress was acting under the Indian Commerce Clause's plenary power. Accordingly, the Court of Appeals held that

Congress, when acting under the Indian Commerce Clause, could abrogate the States' Eleventh Amendment Immunity. Pet. App. 24a.

The Court of Appeals analysis is, however, contrary to this Court's teachings in both Union Gas and Fitzpatrick, as in those cases Congress' power to abrogate the States' immunity was required in order to subject the State to Federal regulation needed to render Congress' conferred power complete. In both Union Gas and Fitzpatrick, the power conferred upon Congress would have been incomplete without the authority to abrogate the States' immunity, and render them liable. In recognizing this, this Court in Union Gas stated:

> Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render the States liable in damages, it must be, that to the extent that the States gave Congress the authority to regulate commerce, they also relinquish their immunity where Congress found it necessary, in the exercise of this authority to render it liable.

(Emphasis added). Union Gas, 491 U.S. at 19-20.

Union Gas considered Congress' enactment of the Comprehensive Environmental Response Compensation, and Liability Act of 1980 ("CERCLA"). That Act provided mechanisms for cleaning up hazardous-waste sites across the nation, and further provided who would be liable for the cost of this remedial action -- remedial action which would be incomplete without making the States liable. The remedy fashioned by Congress in CERCLA, was, in this Court's words, "sweeping":

> [E]veryone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the cost of cleanup...
>
> . . . .
>
> If States, which comprise a significant class of owners and operators of hazardous-waste sites...need not pay for the cost of clean up, the overall effect on voluntary clean ups will be substantial. This case thus shows why the space carved out for federal legislation under the commerce power must include the power to hold the states financially accountable...

(Emphasis added). Union Gas, 491 U.S. at 22 (citation omitted).

In short, in addressing the national hazardous-waste contamination problem, Congress' power to resolve the issue would have been incomplete without making the States subject to the Act's regulation and liable under the Act.

Similarly, in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), this Court held that under the Fourteenth Amendment provisions which empowered Congress to enforce the Amendment by appropriate legislation, Congress, in enacting Title VII of the Civil Rights Act of 1964, could make the States, as employers, liable for damages and attorney fees for unlawful employment discrimination. In Fitzpatrick, as in Union Gas, Congress' power would have been incomplete without making the States subject to the provisions of Title VII and liable for violations of its provisions. That is, the national goal of eliminating employment discrimination on the basis of race, color, religion, sex or national origin, could hardly be achieved if the employment practices of some of the nation's largest employers -- the States -- were not subject to regulation and liable for their violations.

In both Fitzpatrick and Union Gas, Congress, in order to achieve the desired national goal, sought to make the States subject to their regulatory enactments, and liable for the violation of those enactments. In both cases, Congress' achievement of a national goal would have been incomplete unless the States were subject to such regulations, and held liable for violations of the regulations, through court action.

The case presented by IGRA is entirely different. Congress, in enacting IGRA, does not seek, as it did in Fitzpatrick and Union Gas, to use the Federal courts as a means of regulating the States' activities. Under the IGRA, Congress seeks to use the Federal courts to compel the States to regulate tribal activities. Unlike the situation presented in Fitzpatrick and Union Gas, Congress' power to regulate Indian gaming is not rendered incomplete if it lacks the power to use the Federal courts to coerce the States' participation as regulators.

This Court's teaching in both Fitzpatrick and Union Gas is that Congress, even when exercising a plenary power, is only empowered to abrogate the States' Eleventh Amendment immunity, when abrogation of that immunity is necessary to the complete exercise of a power conferred upon Congress -- when subjecting the States to federal regulation is necessary. In Union Gas, regulation of the States que hazardous-waste site operators was necessary. In Fitzpatrick, regulation of the States que employers was necessary.

Neither Fitzpatrick nor Union Gas held that Congress can abrogate a States' immunity when abrogation is not necessary for the complete exercise of Congress' power. In the case at hand, Congress has full power to either regulate the field of Indian gaming itself, or to do so in conjunction with the tribes. That is, its power to regulate the field is complete, it does not need the State to act in its stead in order to make its power complete. Under IGRA,

Congress attempted to abrogate the States' immunity, not in order to subject the States to regulation, but rather in order to use the Federal district courts as tools to compel the States to regulate. In this situation, abrogation is not necessary to the complete exercise of Congress' conferred power. Thus, under the teachings of both Union Gas and Fitzpatrick, Congress is not empowered, in a situation like that before the court, to abrogate the State's immunity. The Court of Appeals opinion, which reached a contrary result, is in conflict with the teachings of both Union Gas and Fitzpatrick.

C. The Court Of Appeals' Holding That The State's Sovereign Contracting Rights Were Not Violated By IGRA's Use Of The Federal Courts To Compel The States To Negotiate And Submit To Mediation, And To Authorize The Secretary Of The Interior To Dictate The Regulatory Obligations of the States, Conflicts With The Teachings Of New York v. United States.

This Court, in New York v. United States, ____ U.S. ___, 112 S.Ct. 2408 (1992), made it unequivocally clear that the Tenth Amendment to the United States Constitution is alive, and that Congress, even in the exercise of a plenary power, may not coercively interfere with the reserved sovereign powers of the States.

This Court recognized in United States v. Bekins, 304 U.S. 27 (1938), that under the reservations to the States in the Tenth Amendment, the States possess the power to contract, Id. at 51-52, and specifically held that "it is of the essence of sovereignty to be able to make contracts and give consent bearing upon exertion of government powers." Id.

Congress, in enacting IGRA, sought to coerce the States in the exercise of their reserved contracting and regulatory powers. As this Court held in New York v.

United States, while Congress, through the use of incentives (like those arising out of Congress' spending power) may encourage the States, Congress lacks the power under the Tenth Amendment to coerce the States:

> We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so.

112 S.Ct. at 2414.

This Court went on to hold that under our constitutional scheme of government, Congress' conferred powers do not include the powers to directly compel the States to require or prohibit -- regulate -- others:

> We have always understood that even where Congress has the power under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit such acts...The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

112 S.Ct. at 2423 (citation omitted).

In addressing itself to the "take title incentives" of the Low Level Radioactive Waste Policy Amendments Act of 1985, this Court stated that, "the take title provision offers state governments a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress." Id. at 2428. The coercive provisions of IGRA offer the States a similar "choice" -- negotiate or be dragged into court to be forced to negotiate, forced to

submit to mediation or forced to follow the regulatory dictates of the Secretary of the Interior. Congress, in enacting IGRA, thus resorted to coercive means to commandeer the States' aid in regulating Indian gaming. Under IGRA, if the States do not negotiate as Congress dictates, they are hauled into court, they are forced to defend themselves, subject to orders of the court which require them to negotiate in good faith, to submit their last best offers to a mediator, and ultimately be subject to the Secretary of the Interior's dictation of their regulatory role in regulating Indian gaming. As the United States District Court for the Western District of Oklahoma correctly held below, Congress in enacting IGRA has "crossed the line distinguishing encouragement from coercion." Pet. App. at 52a - 53a.

There is a split in the district courts on whether IGRA's coercive provisions violate the Tenth Amendment.[8]

The Court of Appeals, in holding that the States' reserve contracting rights were not violated, relied primarily on this Court's opinion in Federal Energy Regulatory Com'n v. Mississippi, 456 U.S. 742 (1982). While admitting that the provisions of IGRA do not fit squarely into the permissive category defined in that case, the Court of Appeals nevertheless held that the provisions of IGRA were analogous to the provisions of the Public

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[8]Compare, Confederated Tribes of the Colville Reservation v. Washington, slip op. No. CS-92-0426-WFN (E.D. Wash. June 4, 1993); Mescalero Apache Tribe v. New Mexico, slip op. No. CIV-92-76-JC (D.N.M. December 22, 1992); Pueblo of Sandia v. King, slip op. No. CIV-92-613-JC (D.N.M. November 13, 1992) and Ponca Tribe of Oklahoma v. Oklahoma, 834 F.Supp. 1341 (W.D. Okla. 1992), which all held that IGRA's provisions violated the Tenth Amendment, with Cheyenne River Sioux Tribe v. South Dakota, 830 F.Supp. 523 (D.S.D. 1993); Rumsey Rancheria of Wintun Indians v. Wilson, slip op. No. CIV-92-812 (E.D. Cal. July 16, 1993) and Yavapai-Prescott Indian Tribe v. Arizona, 796 F.Supp. 1292 (D. Ariz. 1992), which held that IGRA did not violate the Tenth Amendment.

Utility Regulatory Policies Act of 1979 ("PURPA") considered in FERC. The provisions of PURPA discussed by the Court of Appeals simply required that state administrative bodies consider proposed regulations as a condition of continued involvement in a preempted field. FERC, 456 U.S. at 771. Likening IGRA's requirements of good faith negotiations to purpose administrative consideration, the Court of Appeals overlooked the coercive provision of IGRA. Under PURPA, a State that failed to consider the proposed regulations did fall victim to coercive provisions like those in IGRA. The States were not hauled into court, they were not forced to defend themselves or their good faith, they were not subject to the dictates of the Federal district courts that they negotiate, that they submit their last best offer to a mediator, and be subject to having their regulatory role in Indian gaming dictated by the Secretary of the Interior.

The Court of Appeals' decision, which sanctioned the coercive provisions of IGRA -- provisions which crossed the line between encouragement and coercion -- is contrary to the teachings of New York v. United States.

D. Both Issues Are Important Questions of Federal Law Which Profoundly Affect The Constitutional Relationship Among The States, Indian Tribes, And The Federal Government, And Are Issues Which This Court Should Settle.

Fundamental questions of federalism are presented by this case. In Dellmuth v. Muth, 491 U.S. 223, 228 (1989), this Court recognized "the Eleventh Amendment's role as an essential component of our constitutional structure." As this Court held in Blatchford v. Native Village of Noatak, 501 U.S. ____, 111 S.Ct. 2578, 2581 (1991), "the States enter the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty,...and that a State will therefore not be subject to suit in federal court unless it has

consented to suit, either expressly or in the 'plan of the convention'." [citations omitted]. In the case at hand, the question presented is whether the States by the "plan of the convention" have consented to suit, not suit which subjects them to federal regulations needed to make a power conferred upon Congress complete, but rather abrogation of immunity to use the Federal courts as a means of compelling States to regulate in the Federal government's stead.

IGRA seeks to compel the States to exercise their sovereign contracting power to bind themselves to regulate Indian gaming. IGRA does not simply request this, but dictates that the States will negotiate, when the States will negotiate, and how the States will negotiate. It further enlists the Federal district courts as means to compel the States to succumb to Congress' wish that the States regulate in the Federal government's stead. IGRA empowers the courts to entertain suits against the States, and compel the States to negotiate, submit their last best offers to a mediator, and when all other court remedies fail, to subject the States to the regulatory dictates of the Secretary of the Interior.

Both the coercive methods chosen by Congress, and the use of the Federal courts as agents to implement these coercive methods present serious questions directly affecting the States, the Federal government, and the Indian tribe. The split in the circuits on the primary issue presented and the split in the district court on both issues demonstrate that the lower district courts need this Court's guidance on these important issues -- issues which the lower courts must often address and which this Court should settle.

CONCLUSION

For the reasons stated above, the State of Oklahoma respectfully requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

APPENDIX I

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PONCA TRIBE OF OKLAHOMA,

Plaintiff-Appellant,

v.

STATE OF OKLAHOMA; DAVID WALTERS, Governor of the State of Oklahoma, individually and in his official capacity,

Defendants-Appellees.

No. 92-6331

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-92-988-T

PUEBLO OF SANDIA,

Plaintiff-Appellant,

v.

BRUCE KING, Governor, State of New Mexico; STATE OF NEW MEXICO,

Defendants-Appellees.

No. 93-2018

STATES OF ALABAMA, ARIZONA, CALIFORNIA, CONNECTICUT, FLORIDA, KANSAS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA and WASHINGTON,

Amici Curiae.

MESCALERO APACHE TRIBE, The Reservation,

Plaintiff-Appellant,

v.

STATE OF NEW MEXICO; BRUCE KING, Governor of the State of New Mexico,

Defendants-Appellees.

No. 93-2020

STATES OF ALABAMA, ARIZONA, CALIFORNIA, CONNECTICUT, FLORIDA, KANSAS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, and WASHINGTON,

Amici Curiae.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-92-613-JC
(D.C. No. CIV-92-76-JC/WWD)

KICKAPOO TRIBE, also known as Kickapoo Nation in Kansas, of the Kickapoo reservation in Kansas; STEVE CADUE, tribal chairman of the Kickapoo Nation in Kansas; PRAIRIE BAND OF POTAWATOMI INDIANS, a federally recognized tribe,	)	
Plaintiffs-Appellees,	)	No. 93-3110
v.	)	
STATE OF KANSAS,	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 92-4233-SAC)
(D.C. No. 92-4234-SAC)

Gary S. Pitchlynn of Pitchlynn, Odom, Morse & Ritter, Norman, Oklahoma (Ted Ritter and Patrick A. Morse, of Pitchlynn, Odom, Morse & Ritter, with him on the brief), for Plaintiff-Appellant Ponca Tribe of Oklahoma.

Neal Leader, Senior Assistant Attorney General, Oklahoma City, Oklahoma, for Defendants-Appellees State of Oklahoma and David Walters, Governor, State of Oklahoma.

L. Lamar Parrish of Ussery & Parrish, Albuquerque, New Mexico, for Plaintiff-Appellant Pueblo of Sandia.

Gregory M. Quinlan of Fettinger & Bloom, Alamogordo, New Mexico (George E. Fettinger of Fettinger & Bloom, with him on the brief), for Plaintiff-Appellant Mescalero Apache Tribe.

Paul G. Bardacke of Eaves, Bardacke & Baugh, Albuquerque, New Mexico (Kelly Kiernan of Eaves, Bardacke & Baugh and Gerald Velarde, Assistant Attorney General, Santa Fe, New Mexico), for Defendants-Appellees State of New Mexico and Bruce King, Governor, State of New Mexico.

John W. Campbell, Deputy Attorney General, Topeka, Kansas (Robert T. Stephan, Attorney General, State of Kansas, with him on the brief), for Defendant-Appellant State of Kansas.

Glenn M. Feldman of O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, Phoenix, Arizona (Lance Burr, Lawrence, Kansas, with him on the brief), for Plaintiff-Appellee Kickapoo Tribe.

Robert L. Pirtle of Pirtle, Morissett, Schlosser & Ayer, Seattle, Washington (C. Bruce Works of Works, Works & Works, Topeka, Kansas, with him on the brief), for Plaintiff-Appellee Prairie Band of Potawatomi Indians.

Hans Walker, Jr., Washington, D.C. for amicus curiae National Indian Gaming Association.

Thomas F. Gede, Special Assistant Attorney General, Sacramento, California (Daniel E. Lungren, Attorney General, State of California; Jimmy Evans, Attorney General, State of Alabama; Grant Woods, Attorney General, State of Arizona; Richard Blumenthal, Attorney General, State of Connecticut; Robert A. Butterworth, Attorney General, State of Florida; Robert T. Stephan, Attorney General, State of Kansas; Frank J. Kelley, Attorney General, State of Michigan; Mike Moore, Attorney General, State of Mississippi; Joseph P. Mazurek, Attorney General, State of Montana; Don Stenberg, Attorney General, State of Nebraska; Frankie Sue Del Papa, Attorney General, State of Nevada; Susan B. Loving, Attorney General, State of Oklahoma; Jeffrey B. Pine, Attorney General, State of Rhode Island; Mark Barnett, Attorney General, State of South Dakota; and Christine O. Gregoire, Attorney General, State of Washington), for amici curiae the States of Alabama, Arizona, California, Connecticut, Florida, Kansas, Michigan, Mississippi, Montana, Nebraska, Nevada, Oklahoma, Rhode Island, South Dakota, and Washington.

Before **ANDERSON, McKAY,** and **EBEL,** Circuit Judges.

EBEL, Circuit Judge.

These appeals arise from the desire of four Indian tribes to develop gaming operations on their lands pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, et seq.[1] In the wake of failed negotiations to craft tribal-state compacts with Kansas, New Mexico, and Oklahoma -- the states in which the gaming would be situated -- the tribes seek an injunction under IGRA requiring the states to negotiate compacts. We consider first, whether IGRA abrogates the states' Eleventh Amendment immunity, and second, whether IGRA violates the Tenth Amendment. Because the tribes also seek an order directing the Governors to negotiate compacts, we address whether the tribes have stated a cognizable claim under the doctrine of Ex parte Young, 209 U.S. 123 (1908).[2]

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[1]Although these appeals were not consolidated, we consider them jointly in this opinion because the dispositive issues are identical.

[2]Amicus Curiae, The National Indian Gaming Association, argues that IGRA creates a property interest in operating gaming on Indian lands that is entitled to Fourteenth Amendment protection. Because the parties did not raise this issue in the district court, we decline to consider it for the first time in these appeals. Farmers Ins. Co. v. Hubbard, 869 F.2d 565, 570 (10th Cir. 1989).

I. BACKGROUND

In response to the proliferation of Indian gaming operations in the early 1980s, Congress enacted IGRA in 1988 to establish a comprehensive regulatory framework for gaming activities on Indian lands. IGRA seeks to balance the interests of tribal governments, the states, and the federal government. First, IGRA aims "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Concurrently, the statute contemplates a regulatory and supervisory role for the states and the federal government to prevent the infiltration of "organized crime and other corrupting influences." 25 U.S.C. § 2702(2). See S. Rep. No. 446, 100th Cong., 2d Sess. 1-3 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3071-73.

IGRA creates a three-tiered classification of gaming operations and provides varying degrees of federal, state, and tribal regulation over each class. Class I gaming, over which Indian tribes exercise exclusive regulatory control, consists of social games for minimal prizes or as part of tribal ceremonies or celebrations. 25 U.S.C. §§ 2073(6) & 2710(a)(1). Class II gaming includes "bingo . . . pull tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo" and non-banking card games. 25 U.S.C. § 2703(7).[3] Indian tribes may only engage in, license, and

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[3]Excluded from Class II, and therefore included within Class III, are such banking card games as baccarat and blackjack, as well as electronic or electro-mechanical facsimiles of any game of chance, and slot machines. 25 U.S.C. § 2703(7)(B).

regulate Class II gaming if the state in which the gaming is located permits such forms of gaming. 25 U.S.C. § 2710(b)(1). So long as the state permits such gaming, the Indian tribes maintain regulatory jurisdiction over Class II gaming subject to the supervision of the National Indian Gaming Commission (an entity within the Department of Interior). 25 U.S.C. §§ 2710(a)(2) & 2704(a).

Class III gaming includes all forms of gaming not named in Classes I and II (e.g. banking card games, slot machines, casinos, horse and dog racing, and jai-alai). 25 U.S.C. § 2703(8); S. Rep. No. 446, 100th Cong., 2d Sess. 7 (1988), reprinted in in 1988 U.S.C.C.A.N. 3071, 3077. Pursuant to § 2710(d)(1), Class III gaming activities are lawful on Indian lands only if the gaming is (1) authorized by a tribal ordinance approved by the tribe's Chairman; (2) located in a state that permits such gaming; and (3) conducted in conformance with a compact between the Indian tribe and the state. To facilitate this third requirement, § 2710(d)(3)(A) directs the states to "negotiate with the Indian tribe in good faith" to craft a compact governing Class III gaming. The congress stated that "the use of compacts between tribes and states is the best mechanism to assure that the interest of both sovereign entities are met . . . ." 1988 U.S.C.C.A.N. at 3083.

As the appeals before us demonstrate, however, tribal-state cooperation has often proved elusive. In contemplation of this occurrence, Congress provided for judicial review of a tribe's allegation that a state has failed to negotiate a tribal-state compact in good faith. Section 2710(d)(7)(A)(i) provides that:

> The United States district courts shall have jurisdiction over ... any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith.

The state bears the burden of proving that it has negotiated with the tribe in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii). To determine whether a state has failed to negotiate in good faith, the court may consider "the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities," as well as "any demand by the State for direct taxation of the Indian tribe or of any Indian lands." 25 U.S.C. § 2710(d)(7)(B)(iii).

If the district court concludes that the state has failed to negotiate in good faith, IGRA provides a cascade of enforcement mechanisms to authorize Class III gaming on Indian lands. First, the court shall order the tribe and state to develop a compact within sixty days. 25 U.S.C. § 2710(d)(7)(B)(iii). If the parties fail to develop a tribal-state compact within this sixty-day period, the tribe and the state each must submit a proposed compact to a mediator appointed by the district court. 25 U.S.C. § 2710(d)(7)(B)(iv). "The mediator shall select from the two proposed compacts the one which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." Id. Once the mediator submits the selected compact to the state and the

tribe, the state has sixty days in which to consent. 25 U.S.C. §§ 2710(d)(7)(B)(v) & (vi).

If the state consents to the proposed compact selected by the mediator within the sixty-day period, that compact becomes binding on the state and the tribe. 25 U.S.C. § 2710(d)(7)(B)(vi). However, if the state does not consent, the mediator shall notify the Secretary of the Interior, who shall authorize Class III gaming by prescribing governing procedures that "are consistent with the proposed compact selected by the mediator, the provisions of IGRA and the relevant provisions of the laws of the State." 25 U.S.C. § 2710(d)(7)(B)(vii).

The tribes in the instant cases allege that Kansas, New Mexico, and Oklahoma have violated § 2710(d)(3)(A) by failing to negotiate in good faith. The suits proceeded individually in the district courts. Each state moved to dismiss under Fed. R. Civ. P. 12(b)(1) on Eleventh Amendment grounds. Additionally, New Mexico and Oklahoma contended that IGRA violates the Tenth Amendment and that the tribes could not obtain injunctive relief against their Governors under the doctrine of Ex parte Young.

The district courts reached conflicting conclusions on the states' defenses. In Ponca Tribe of Oklahoma v. Oklahoma, 834 F. Supp. 1341 (W.D. Okla. 1992) ("Ponca"), Pueblo of Sandia v. King, slip. op. No. CIV-92-0613-JC (D. N.M. 1992) ("Pueblo of Sandia"), and Mescalero Apache Tribe v. New Mexico, slip. op. No. CIV-92-076-JC (D. N.M. 1992) ("Mescalero Apache"), the

courts held that the Eleventh Amendment barred the tribes' suits because Congress lacked the authority to abrogate the states' Eleventh Amendment immunity. The courts thus dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). The courts also held that the suits against the Governors of Oklahoma and New Mexico fell outside the parameters of Ex parte Young doctrine because a court order to negotiate a tribal-state compact would infringe upon executive discretion. Lastly, the courts ruled that IGRA violates the Tenth Amendment because it requires states to negotiate tribal-state compacts, does not afford states the option to refuse to regulate Class III gaming, and allows the Secretary of the Interior to commandeer state governments to regulate Class III gaming. We have jurisdiction under 28 U.S.C. § 1291 to entertain the tribes' appeals of these rulings.

In the fourth case, Kickapoo Tribe of Indians v. Kansas, 818 F. Supp. 1423 (D. Kan. 1993) ("Kickapoo"), the district court held that Congress does have the power to abrogate the states' Eleventh Amendment immunity pursuant to IGRA and that Kansas may therefore be sued in federal court for failing to negotiate a tribal-state compact in good faith.[4] We have jurisdiction over Kansas' appeal under the collateral order doctrine. Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 113 S. Ct. 684 (1993) (permitting an immediate appeal of a court's denial of Eleventh Amendment immunity because the state's purported

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[4]Neither an Ex parte Young claim nor the Tenth Amendment question was before the court in Kickapoo.

right to be free from suit cannot be effectively vindicated on appeal after trial).

We review de novo the district courts' Rule 12(b)(1) rulings on the States' Eleventh Amendment claims. Williams v. United States, 957 F.2d 742, 743 (10th Cir. 1992). We also review de novo the courts' legal conclusions that IGRA violates the Tenth Amendment and that the Ex parte Young doctrine is inapplicable. Estate of Holl v. Commissioner of Internal Revenue, 967 F.2d 1437, 1438 (10th Cir. 1992).

II. THE ELEVENTH AMENDMENT

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend XI. The Supreme Court has held that the states' Eleventh Amendment immunity extends as well to suits commenced by Indian tribes. Blatchford v. native Village of Noatak, 111 S. Ct. 2578, 2583 (1991). Thus, the Eleventh Amendment imposes a constitutional limitation on the jurisdiction of Article III courts. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984).

The Court has, however, identified three instances in which the Eleventh Amendment does not deprive an Article III court of jurisdiction to entertain allegations of state governmental wrongdoing. First, Congress may abrogate the

states' Eleventh Amendment immunity "by making its intention unmistakably clear" in the text of a federal statute enacted pursuant to constitutional provisions that empowers Congress with abrogation rights. Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989). Second, a state may expressly waive Eleventh Amendment immunity. Edelman v. Jordan, 415 U.S. 651, 673 (1974). And third, we may consider a suit against a state official to enjoin a non-discretionary violation of federal law. Ex parte Young, 209 U.S. 123, 159-160 (1908).

Our Eleventh Amendment analysis of the tribes' suits consists of two inquiries" whether IGRA expresses an unmistakable Congressional intent to obrogate the states' Eleventh Amendment immunity, and if so, whether the Constitution empowers Congress to abrogate the states' Eleventh Amendment immunity pursuant to the Indian Commerce Clause, Art. I, § 8, cl. 3.

A. Congressional Intent to Abrogate

The Supreme Court adheres to a rigorous test to determine whether Congress has abrogated the States' Eleventh Amendment immunity: Congress must make its intention to abrogate "unmistakably clear in the language of the statute." Dellmuth, 491 U.S. at 228 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)). It is not sufficient generally that Congress has given jurisdiction to federal courts to consider certain kinds of claims. The mere "fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim." Blatchford, 111 S. Ct. at 2585 n.4;

Atascadero, 473 U.S. at 246 ("A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."). Rather, to abrogate the states' Eleventh Amendment immunity, Congress must clearly express its intent that states may be brought into federal court to answer to the particular charge at issue.

IGRA specifically empowers federal courts to entertain "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe." 25 U.S.C. § 2710(d)(7)(A)(i). Additionally, Section 2710(d)(7)(B) places the burden of proving good faith in such an action on the states. Inasmuch as a state is the only conceivable defendant in such a suit, and it must be contemplated that the state will be a party if a burden of proof is allocated to it, Congress has unmistakably expressed its intent to subject states to suit in federal court under IGRA and thus satisfies the Supreme Court's abrogation test. Seminole Tribe of Florida v. Florida, 11 F.2d 1016, 1024 (11th Cir. 1994); Cheyenne River Sioux Tribe v. South Dakota, 3 F.2d 273, 281 (8th Cir. 1993). Indeed, every court that has considered this question has concluded that IGRA embodies a clear expression of Congressional intent to abrogate state sovereign immunity. Neither the states nor amici in the instant case has cited any authority to the contrary.

Despite IGRA's failure to refer specifically to the Eleventh Amendment, as Congress did, for example, in the Americans with Disabilities Act, 42 U.S.C. § 12202, we do not read the Supreme Court's Eleventh Amendment

jurisprudence as imposing any such requirement. Indeed, the Supreme Court has found Congressional abrogation even when federal statutes fail to refer specifically to the Eleventh Amendment or state sovereign immunity. See, e.g., Pennsylvania v. Union Gas Co., 491 U.S. 1, 13 (1989); Fitzpatrick v. Bitzer, 427 U.S. 445, 449 (1976).[5]

To be sure, the Court in Dellmuth observed that the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400 et seq., "makes no reference whatsoever to either the Eleventh Amendment or the State's sovereign immunity." Dellmuth, 491 U.S. at 231. However, the Court's conclusion in Dellmuth that the EHA did not abrogate the states' Eleventh Amendment turned not on the absence of any specific mention of the Eleventh Amendment, but rather on the determination that the statute's structure merely created a "permissible inference" that Congress intended to subject the States to damage actions for violations of the EHA and it did not compel such a conclusion. Id. at 231-

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[5]In Union Gas, a majority of the Court read the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") as a clear expression of Congressional intent to abrogate Eleventh Amendment immunity because, inter alia, CERCLA included states within the definition of "person," the term used to describe those who may be held liable for cleanup costs recoverable under CERCLA, and provided that state and local governments are to be considered "owners and operators," except in narrow circumstances. Union Gas, 491 U.S. at 7-10. And in Fitzpatrick, the Court held that Title VII of the Civil Rights Act of 1964 satisfies the clear-statement rule because 42 U.S.C. § 2000e(a) expressly defines "person" to include "government" and "government agencies"; and § 2000e(f) includes within the definition of "employee" those individuals "subject to the civil service laws of a State government, governmental agency or political subdivision." Fitzpatrick, 427 U.S. at 449 n.2.

32.[6] In contrast, the only inference that can be drawn from IGRA'S language is that Congress meant to strip the states of their Eleventh Amendment immunity for failing to negotiate a tribal-State compact in good faith. 25 U.S.C. § 2710(d)(7)(A)(i).

Congress need not express its intent to abrogate in a particular talismanic incantation, but can make its intention unmistakably clear in the text of a statute without specific reference to the Eleventh Amendment or state sovereign immunity. Because IGRA satisfies this test, we affirm the district courts' ruling that Congress intended to abrogate the states' Eleventh Amendment immunity in IGRA.

B. Congressional Power to Abrogate

Having concluded that IGRA authorizes suits against the States, we next must consider whether the Indian Commerce Clause empowers Congress to override the states' Eleventh Amendment immunity.[7] This question has sharply divided the courts. Compare Spokane Tribe v. Washington, 28 F.3d 991 (9th Cir. 1994) (upholding Congress' authority to abrogate Eleventh Amendment immunity pursuant to the

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[6]Indeed, EHA merely contains a general grant of federal court jurisdiction akin to the infirm jurisdictional statutes in Atascadero, 473 U.S. at 245-46, and Blatchford, 111 S. Ct. at 2584-86, that failed to identify States as potential defendants.

[7]The Indian Commerce Clause provides that "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes." Art. I, § 8, cl. 3. Because IGRA governs commerce with Indian tribes, we conclude that Congress enacted it under the Indian Commerce Clause, not the Interstate Commerce Clause.

Indian Commerce Clause), Cheyenne River Sioux Tribe, 3 F.3d at 281 (same), with Seminole Tribe of Florida, 11 F.3d at 1028 (concluding that Congress lacks the power to abrogate Eleventh Amendment immunity under IGRA).

The abrogation doctrine based on the principle that, while the Eleventh Amendment imposes a constitutional limitation on the jurisdiction of Article III courts, Congress may remove the amendment's specific constraint on federal judicial power by a federal statute enacted pursuant to certain constitutional provisions bestowing plenary powers on Congress. See Dellmuth, 491 U.S. at 227. The Court first articulated the concept of abrogation in Fitzpatrick, holding that Congress may abrogate Eleventh Amendment immunity in legislation enacted pursuant to § 5 of the Fourteenth Amendment. Fitzpatrick, 427 U.S. at 456.

The dual rationale underlying the Court's analysis in Fitzpatrick was that the Fourteenth Amendment expanded federal power at the same time that it contracted state power. "When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority." Id. (upholding money award against a state under Title VII of the Civil Rights Act of 1964 because the "Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment").

Not until 1989 did the Court recognize a second constitutional source of authority of Congressional abrogation, namely, the Interstate Commerce Clause. Union Gas, 491 U.S. at 13-23)plurality opinion).[8] Anchored on the dual principles articulated in Fitzpatrick, Justice Brennan's plurality opinion in Union Gas explained that, like the Fourteenth Amendment, the "Commerce Clause withholds power from the States at the same time as it confers it on Congress." Id. at 19. The plurality added that "to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable." Id. at 19-20. As in Fitzpatrick, the plurality in Union Gas observed that the Commerce Clause reflected a shift in the balance of power between the states and the federal government under our constitutional structure, a logical consequence of which is that Congress may exercise its plenary powers by subjecting the states to suit in federal court. This theory of structural federalism pervades the Court's Eleventh Amendment jurisprudence. See Alex E. Rogers, Note, Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Art-of-the-State Doctrine, 92 Colum. L. Rev. 1243, 1253-64 (1992).

In an attempt to sap Union Gas of any doctrinal significance, the states in the instant cases first make much of the fact that the Court was splintered in Union Gas and

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[8]Justice White joined Justice Brennan's plurality opinion's conclusion that "Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States." Union Gas, 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part).

that Justice White, the fifth vote on the Commerce Clause abrogation question, stated that he did "not agree with much of [Justice Brennan's] reasoning." Id. at 57.[9] However, we are unwilling to sweep aside Union Gas as lacking precedential value or guidance for our analysis. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . . '" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Steward, Powell, and Stevens, J.J.)). It is beyond dispute that five Justices in Union Gas held that Congress possesses the power to abrogate Eleventh Amendment immunity pursuant to the Interstate Commerce Clause of Article I.

Also, we find informative the Union Gas plurality opinion's reliance on the dual factors articulated in Fitzpatrick to explain Congress' ability to abrogate: the Commerce Clause "with one hand gives power to Congress while, with the other, it takes power away from the States." Union Gas, 491 U.S. at 16. Thus, for purposes of Congress' abrogation authority, and "the Eleventh Amendment's role as an essential component of our constitutional [federal-state] structure," Dellmuth, 491 U.S.

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[9]The states additionally assert that Union Gas remains on especially shaking grounds because three of the five Justices who voted to uphold Congress' power to abrogate pursuant to the Commerce Clause have since retired from the Court. Since the States' briefing, a fourth Justice who so voted has now retired. Nonetheless, we are bound by the Court's holdings until the Court overrules them.

at 228, we perceive no constitutional distinction between the plenary powers bestowed in the Fourteenth Amendment, the Interstate Commerce Clause, and the Indian Commerce Clause.

Consistent with our understanding of Congress' plenary powers and the teachings of Fitzpatrick and Union Gas, the Ninth Circuit recently held that IGRA strips the states of their Eleventh Amendment immunity because Congress enacted the statute pursuant to its plenary powers under the Indian Commerce Clause. Spokane Tribe, 28 F.3d 991, 1994 WL 316433 at *4-5. "[T]he analysis developed by the Supreme Court in both Union Gas and Fitzpatrick v. Bitzer is equally applicable to the Indian Commerce Clause . . . . [A]s in Union Gas and Fitzpatrick, Congress is acting under one of its plenary powers." Id. at *5. See also Cheyenne River Sioux Tribe, 3 F.3d at 280 ("[g]iven Congress' plenary authority over Indian relations . . . Congress, when acting pursuant to the Indian Commerce Clause, has the power to abrogate the States' [eleventh Amendment immunity") (quoting with approval Seminole Tribe of Florida v. Florida, 801 F. Supp. 655, 658 (S.D. Fla. 1992), rev'd, Seminole Tribe of Florida, 11 F.3d at 1028)).

The Indian Commerce Clause confers on Congress "The plenary power to legislate in the filed of Indian affairs." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). Just as the Interstate Commerce Clause shifts the balance of state-federal power to Congress to regulate commerce among the states, so too does the Indian Commerce Clause render "Indian relations . . . the exclusive

province of federal law." County of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226, 234 (1985); Spokane Tribe, 28 F.3d 991, 1994 WL 316433 at *5 ("Congressional power pursuant to the Indian Commerce Clause . . . cannot be less than its authority under the Interstate Commerce Clause.").

The States argue that the disparate purposes of the Indian and Interstate Commerce Clauses render the abrogation analysis in Union Gas inapposite. In so doing, the States cite to Cotton Petroleum, 490 U.S. at 192, that explained that whereas "the Interstate Commerce Clause is concerned with maintaining free trade among the States . . . the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." Because the jurisprudence under "Interstate Commerce Clause [] is premised on a structural understanding of the unique role of the States in our constitutional system," it "is not readily imported to cases involving the Indian Commerce Clause." Id.

The obvious differences between the two clauses, however, do not lead us to conclude that Congress lacks the power to abrogate Eleventh Amendment immunity under the Indian Commerce Clause. Indeed, the States' focus is misplaced. What was relevant for the abrogation analysis in both Fitzpatrick and the plurality opinion in Union Gas was not just the subject matter of the constitutional provisions, but also whether the provisions bestowed plenary power on Congress to the exclusion of the states' authority in the field.

Fitzpatrick, 427 U.S. at 456; Union Gas, 491 U.S. at 19-20.[10] Moreover, Cotton Petroleum's discussion of the disparate applications of the two clauses considered only whether Indian tribes could be treated as states under the Interstate Commerce Clause for purposes of tax apportionment. 490 U.S. at 191-193. The case did not address Congress' ability to abrogate Eleventh Amendment immunity and therefore is not controlling precedent for our analysis. Spokane Tribe, 28 F.3d 991, 1994 WL 316433 at * 4 (The Cotton Petroleum observation "that Interstate Commerce Clause doctrine cannot always readily be applied to cases involving the Indian Commerce Clause . . . does not speak to the scope of congressional power under either [clause]."). Accord Seminole Tribe of Florida, 11 F.3d at 1027 (Cotton Petroleum is "not directly on point" for whether the Indian Commerce Clause allows Congress to abrogate Eleventh Amendment immunity.).

Nor do we find convincing the States' contention that the Court's opinion in Blatchford compels us to conclude that Congress lacks the power to abrogate under the Indian Commerce Clause. In Blatchford, the Court held that the Eleventh Amendment bars suits by Indian tribes against states because the states did not consent to such suits when they adopted the Constitution. Blatchford, 111 S. Ct. at

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[10]Although Justice Scalia dissented in Union Gas, he opined that "if the Article I commerce power enables abrogation of state sovereign immunity, so do all other Article I powers." Union Gas, 491 U.S. at 42. Justice White made the same observation in his concurrence. Id. at 57. Of course, for our purposes, we need not speak so broadly and we concern ourselves only with Congressional power to abrogate under the Indian Commerce Clause.

2583. There, the tribes argued that, just as the states are deemed to have waived their immunity against suits by sister states, so had the states waived their immunity against suits by tribes. The Court in Blatchford rejected this argument, noting that the states' waiver of immunity against suits by sister states arises from a "mutuality of . . . concession" between the states that is inherent in the "constitutional compact." Id. at 2582[.] Because the constitutional compact does not embody an analogous mutuality of concessions between the states and the tribes, Blatchford held that the states have not waived Eleventh Amendment immunity to suits brought by tribes. Id. at 2583.

The States' reliance on this discussion in Blatchford elides the difference between waiver and abrogation. Indeed, the Court discussed both doctrines and held that, in addition to a lack of waiver, Congress did not satisfy the Dellmuth clear-statement abrogation test in 28 U.S.C. § 1362. Id. at 2585.[11] The Indian tribes in the cases before us advance only an abrogation claim, not a state waiver theory. The Blatchford Court's historical analysis about waiver in no way undermines Union Gas, which only considered Congress' abrogation powers. Union Gas, 491 U.S. at 23 n.5 ("Since Union Gas itself eschews reliance on the theory of waiver . . . we neither discuss this theory here nor understand why Justice Scalia feels the need to do so.").

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[11]The Court in Blatchford did not explicitly rule on whether Congress has the power to abrogate Eleventh Amendment immunity for suits commenced by Indian tribes against the states. The Court did not reach this question because 28 U.S.C. § 1362 did not contain an unequivocal Congressional expression of intent to abrogate. Blatchford, 111 S. Ct. at 2585.

Blatchford's only abrogation analysis was under 28 U.S.C. § 1362, and, as pointed out above, that analysis is not instructive for us because the court found no unequivocal Congressional statement of intent to abrogate in that statute. However, the fact that the Court in Blatchford proceeded to consider the tribe's separate abrogation theory demonstrates that the historical analysis of waiver does not undermine the conclusions that Congress may abrogate Eleventh Amendment immunity pursuant to its Article I plenary powers.

For these reasons, we conclude that the Indian Commerce Clause empowers Congress to abrogate the states' Eleventh Amendment immunity and that IGRA constitutes an unequivocal expression of Congress' intent to do so.[12] We

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[12]We therefore decline to follow that portion of the Eleventh Circuit's recent ruling in Seminole Tribe of Florida, 11 F.3d at 1028, which concluded that Congress lacks the power to abrogate Eleventh Amendment immunity in IGRA. In Seminole Tribe of Florida, the court held that Congress lacked the power to abrogate Eleventh Amendment immunity when "it legislates in an area typically reserved to the states (such as negotiating regulations with Indian tribes)." Id. The court discerned a distinction between governmental and proprietary functions, concluding that the Supreme Court has allowed federal jurisdiction over states only when the states "partake in an activity typical of private individuals." Id.

We do not read the Supreme Court's Eleventh Amendment jurisprudence as adopting this governmental-proprietary distinction, and take note of the fact that the Court has rejected this dichotomy in at least some in other constitutional law contexts. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985) (denouncing dichotomy in Tenth Amendment jurisprudence as "unsound in principle and unworkable in practice" and thus overruling "traditional [state] governmental functions" test in National League of Cities v. Usery, 426 U.S. 833 (1976)). Rather than focusing on the nature of the state

therefore affirm the judgment in Kickapoo and reverse the rulings in Ponca, Pueblo of Sandia, and Mescalero.[13]

III. THE TENTH AMENDMENT

We next address whether IGRA violates the Tenth Amendment by requiring states to negotiate tribal-state compacts in good faith. U.S. Const. amend X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). The Supreme Court recently breathed new vitality into the Tenth Amendment when it observed that "[t]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." New York v. United States, 112 S. Ct. 2408, 2418 (1992).

To discern whether IGRA entrenches upon the sovereignty that the Constitution preserves for the states, we must examine the nature of the federal directive in IGRA and its impact on the states' regulatory prerogatives. In this regard, we find most instructive the principles articulated in New York and FERC v. Mississippi, 456 U.S. 742 (1982), a case discussed in New York as marking a critical line in

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governmental activity, cases arising under Congress' authority to abrogate have looked solely to the constitutional source of power under which the federal statute was enacted.

[13]Because we conclude that Congress has the power to abrogate the states' Eleventh Amendment immunity, we need not reach the Indian tribes' alternative rationale that the States have waived their Eleventh Amendment immunity.

the Constitution's division of authority between the federal government and the states. New York, 112 S. Ct. at 2420-21.

In New York, the Court reaffirmed that Congress may not exercise its Article I plenary powers to "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Id. at 2420 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n. Inc., 452 U.S. 264, 288 (1981)). The unconstitutional exercise of Congressional power in New York was the so-called "take-title" mandate in the Low-Level Radioactive Waste Policy Act, which gave states an option: either accept ownership of (and thus liability for) low-level radioactive waste generated by private operators within their borders or regulate such waste pursuant to Congress' instructions. Id. at 2427-28 (interpreting 42 U.S.C. § 2021e(d)(2)(C)).

Inasmuch as Congress lacked the authority to impose either option, the Court in New York concluded that a Congressional directive to the states to choose between these two options was constitutionally impermissible as well. Id. at 2428 ("A choice between two unconstitutionally coercive regulatory techniques is no choice at all."). Writing for the majority, Justice O'Connor explained that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program" because the states are neither "political subdivisions," "regional offices," nor "administrative agencies of the Federal Government." Id. at 2434-35. When the federal government compels state regulation, rather than merely encouraging it, state and

federal accountability is diminished because the state can no longer regulate "in accordance with the views of the local electorate," while the "federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." New York, 112 S. Ct. at 2424.

Of course, Congress enjoys several options short of imposing a coercive regulatory directive on the state.

> First, under Congress' spending power, "Congress may attach conditions on the receipt of federal funds." South Dakota v. Dole, 483 U.S. 203, 206 (1987) [upholding Congress' authority to condition federal highway funds on the States' adoption of a minimum drinking age of 21 years old].
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> . . .
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> Second, . . . we have recognized Congress' power to offer States the choice of regulating [an] activity according to federal standards or having state law preempted by federal regulation. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 288.

New York, 112 S. Ct. at 2423-24. And third, the Supremacy Clause permits Congress to preempt an entire field of regulation and thereby deprive the states of any

regulatory role. See Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982).[14]

If New York teaches that the Tenth Amendment prohibits a federal directive that requires the states to enact or enforce a federal regulatory program, FERC instructs that Congress may require the states to consider, but not necessarily adopt, a federal program. FERC, 456 U.S. at 761-64. In FERC, the Court upheld three provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA") against a Tenth Amendment challenge. The provisions required state regulatory commissions to adjudicate disputes arising under PURPA; directed the state commissions to consider adopting federal rate structures and regulatory standards; and required the commissions to follow specified notice and comment procedures in considering the suggested federal rate structures.

Most instructive for our purposes is FERC's discussion of the statutory requirement that states consider the suggested federal standards. The Court explained that this provision did not impermissibly infringe on state sovereignty because its language merely invited states to take action in a preemptible area, rather than directly compelling them to enact a legislative program. Id. at 765 (noting that

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[14]We recognize that, on a practical level, a state may find very little difference between a federal statute that compels it to regulate and one that seeks to induce state regulations by conditioning the receipt of federal funds on the adoption of a state law that promotes a federal policy. Nevertheless, the constitutionally cognizable difference between the two is that, whereas the former infringes the states' sovereignty, the latter ultimately reserves the states the decision to opt out.

"[t]here is nothing in PURPA 'directly compelling' the States to enact a legislative program"). Indeed, it is this distinction between a permissive and mandatory statutory directive that separates the provision in FERC from the statute in New York: Congress may not usurp state discretion by commanding the states to enact or enforce a federal program, but it may direct a state to consider implementing a federal program so long as the states retain the prerogative to decline Congress' invitation. New York, 112 S. Ct. at 2420-24.[15]

Guided by the permissive-mandatory dichotomy established in FERC and New York, we conclude that IGRA does not run afoul of the Tenth Amendment. Because IGRA merely directs the state to negotiate in good faith, and stops well short of imposing a requirement on the states to enact or enforce a federal regulatory program, IGRA is more akin to the permissible statutory scheme in FERC than to constitutionally infirm provision at issue in New York. In essence, the states' duty under § 2710(d)(3)(A) to negotiate with the Indian land in good faith is nothing more than a requirement that the states make a good faith attempt to craft a voluntary agreement with the Indian tribe pertaining to Class III gaming on Indian land that is consistent with state policy. FERC, 456 U.S. at 765-66 (underscoring that

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[15]In FERC, the Supreme Court also observed that the state could avoid any obligation to entertain federal proposals by eliminating its own utility commission entirely. However, that option was not seriously advanced as a viable one and it does not detract from the general distinction, upon which that opinion is based, between requiring a state merely to consider a federal proposal and requiring a state to enact or enforce a program.

PURPA did not require the states to adopt a legislative program). IGRA reflects Congress' attempt to encourage, but not mandate, cooperative rulemaking between the Indian tribes and the states.

Under IGRA, if a state opts not to enter into a tribal-state compact, the Secretary of the Interior will ultimately prescribe and enforce regulations to govern Class III gaming.[16] See Cheyenne River, 3 F.3d at 281 ("IGRA does not force states to compact with Indian tribes regarding Indian gaming and does not violate the tenth amendment."); Yavapai-Prescott Indian Tribe v. Arizona, 796 F. Supp. 1292, 1297 (D. Ariz. 1992) ("IGRA's terms do not force the State to enter into a compact, it only demands good faith negotiation in order to meet state, as well as tribal and federal, interests."). Be permitting the states ultimately to abstain from exercising a regulatory role, IGRA's default provision stands in marked contrast to the statue in New York, which strictly confined the states' options to either enacting the federal program or taking title to radioactive waste generated within their borders that could subject them to future liability.

An additional factor that distinguishes IGRA from the unconstitutional provision in New York, and reinforces its similarity to the statute upheld in FERC, is that IGRA preserves state governmental accountability in the field of Indian gaming. As discussed above, the Court in New York

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[16]Under § 2710(d)(7)(B)(vi), if the parties are unable to agree upon a compact, the Secretary of the Interior promulgates procedures -- consistent with "the relevant provisions of the laws of the State" -- to govern the tribe's Class III gaming under § 2710(d)(7)(B)(vii).

identified public accountability as a critical component of the states' Tenth Amendment sovereignty. New York, 112 S. Ct. at 2424. Whereas a Congressional command to the states to enact or enforce a federal program ignores whether the state's citizens approve of such actions, IGRA permits the states to negotiate tribal-state compacts in accordance with the views of the local electorate. If a state has a policy prohibiting all Class III gaming, then Indian Class III gaming is also automatically prohibited. 25 U.S.C. § 2710(d)(1)(B). If it has any other less restrictive policy or preference regarding Class III gaming in particular, or Class III gaming on Indian lands specifically, nothing in IGRA requires the state to surrender or compromise those policies or preferences in attempting to negotiate a compact with the Indian tribe. Of course, the federal government may ultimately override state policy by regulation[17] imposed by the Secretary of the Interior, but that action would not implicate the Tenth Amendment.

Nor does IGRA impose an onerous burden on state financial resources. The Supreme Court has made clear that the mere fact that a federal statute requires a state to expend resources in compliance therewith, by itself, is not fatal for Tenth Amendment purposes. FERC, 456 U.S. at 770 n.33 ("[I]n a Tenth Amendment challenge to congressional activity, 'the determinative fact . . . [is] the nature of the federal action, not the ultimate economic impact on the States.'") (quoting Hodel, 452 U.S. at 292 n.33). In FERC, for example, the Court rejected the claim that the Tenth

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[17]Except of course, if the state prohibits all Class III gaming in the state, the federal government is not authorized to override any such absolute prohibition. 25 U.S.C. § 2710(d)(1)(B).

Amendment prohibited PURPA from imposing a financial burden on state utility commissions by requiring them to comply with certain reporting requirements and to adjudicate federal disputes through their state mechanism. Id. at 760, 770 n.33. In any event, the states offer no evidence that IGRA requires them to devote excessive resources to negotiate in good faith.

To be sure, IGRA does not fit squarely into the permissive category defined in FERC because the statute does not simply invite the states to consider negotiating with Indian tribes, but rather requires the states to negotiate in good faith. Indeed, standing alone and read literally, the court's power under § 2710(d)(7)(B)(iii) of IGRA to order a state and Indian tribe to conclude a compact could be construed as a Congressional command to regulate. 25 U.S.C. § 2710(d)(7)(B)(iii) ("If . . . the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact . . . the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period."). However, this language is not susceptible to a literal reading because it is simply not possible to order two parties to enter into an agreement if they do not agree. Congress could, under its Supremacy Clause powers, impose rules on a reluctant state, but it lacks to the power to force the state to agree to do something voluntarily.

Further, "[w]e do not construe statutory phrases in isolation; we read statutes as a whole." United States v. Morton, 467 U.S. 822, 828 (1984). IGRA's directive to the states to conclude a compact must be rad in the context of

the sections that immediately follow in § 2710(d)(7), which contemplate that a state and tribe may fail to agree to a compact. In that event, the states are not required to do anything further, and instead the Secretary of the Interior takes over. Had Congress intended to mandate that the states enter into compacts with Indian tribes, it would not have included these latter sections in § 2710(d)(7).[18] Cf.

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[18]25 U.S.C. § 2710(d)(7)(B), provides in pertinent part:

> (iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings of the court.
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> (v) The mediator appointed by the court under the clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).
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> (vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (vi), the proposed compact shall be treated as a Tribal-State compact entered into paragraph (3).
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> (vii) If the States does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

There are some similarities between IGRA and the Interstate Horseracing Act, 15 U.S.C. § 3001 et seq., recently upheld in Kentucky Division, Horsemen's Benevolent & Protective Assn, Inc. v. Turfway Park Racing Ass'n, 20 F.3d 1406, 1415-16 (6th Cir. 1994). Under the Interstate Horseracing Act, a race facility must obtain the state's consent to participate in interstate wagering. The state agency responsible for such regulation argued that this provision violated the Tenth Amendment because it required the state to exercise its regulatory authority in either granting or denying such approval. However, the Sixth Circuit concluded that the Act did not require the states to regulate because a state may decline to regulate, thereby retaining the federal regulatory ban on interstate off-tract betting pursuant

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mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures --

> (I) which are consistent with the proposed compact selected by the mediator under clause (vi), the provisions of this chapter and the relevant provisions of the laws of the State, and
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> (II) under which class III gaming may be conducted on the Indian Lands over which the Indian tribe has jurisdiction. (emphasis added).

to § 3003 of the Act. Turfway Park, 20 F.3d at 1415-16. Similarly, in the statutory scheme provided by IGRA, the state's refusal to consent to a compact merely triggers permissible federal action. Compare Board of Natural Resources v. Brown, 992 F.2d 937, 946-47 (9th Cir. 1993) (declaring unconstitutional §§ 620c(d)(2) & 620c(d)(3)(A) of the Forest Resources Conservation and Shortage Relief Act because they constitute "direct commands to the states to regulate according to Congress's instructions").

For the foregoing reasons, we hold that IGRA does not violate the Tenth Amendment. We therefore reverse the judgments to the contrary in Ponca, Pueblo of Sandia, and Mescalero Apache.

IV. THE EX PARTE YOUNG DOCTRINE

The final issue we consider in these appeals is the tribes' request for an order under IGRA directing the Governors of Oklahoma and New Mexico, respectively, to negotiate tribal-state compacts. The district courts in Ponca, Pueblo of Sandia, and Mescalero Apache dismissed this claim as barred by Ex parte Young, 209 U.S. 123 (1908).

Under the Ex parte Young doctrine, the Eleventh Amendment does not bar a suit in federal court against state officers to enjoin federal law violations. Ex parte Young, 209 U.S. at 159-60. A state officer who violates federal law "is stripped of his official or representative character and is subjected in this person to the consequences of his individual conduct. The State has no power to impart to him any

immunity from responsibility to the supreme authority of the United States." Id. at 160.

A critical limitation on this doctrine, however, is that a federal court may only order a state officer to perform a ministerial act. Id. at 158 (explaining that the injunction "can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action").

In light of our Tenth Amendment analysis, IGRA does not required to states to regulate Class III gaming by entering into tribal-state compacts. Instead, the only obligation on the state is to negotiate in good faith. The act of negotiating, however, is the epitome of a discretionary act. How the state negotiates; what it perceives to be its interests that must be preserved; where, if anywhere, that it can compromise its interests -- these all involve acts of discretion. Thus, injunctive relief against the governors is barred under Ex parte Young. Seminole Tribe of Florida, 11 F.3d at 1028-29 (rejecting Ex parte Young claim against the governors of Florida and Alabama because the decision to negotiate is discretionary, not ministerial); Accord Poarch Band of Creek Indians v. Alabama, 784 F. Supp. 1549, 1551-52 (S.D. Ala. 1992), aff'd, Seminole Tribe, 11 F.3d at 1028-29.

Additionally, the tribes' suits against the Governors are in reality suits against the respective states and thus not authorized under the doctrine of Ex parte Young. "The Eleventh Amendment bars a suit against state officials when

'the state is the real, substantial party in interest.'" Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 101 (1984) (quoting Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 464 (1945)). "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" Dugan v. Rank, 372 U.S. 609, 620 (1963) (quoting Land v. Dollar, 330 U.S. 731, 738 (1947); Larson v. Domestic & Foreign Corp., 337 U.S. 682, 704 (1949)) (emphasis added). Because IGRA names only the state as the party to negotiate with Indian tribes, an injunction ordering a Governor to negotiate a compact would operate against the state itself because the state is the only party that may enter into a compact with an Indian tribe. Pennhurst, 465 U.S. at 102 ("[A] suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.").

Accordingly, we affirm the judgments in Ponca, Pueblo of Sandia, and Mescalero Apache dismissing the tribes' suit against the Governors of Oklahoma and New Mexico.

V. CONCLUSION

In accordance with the foregoing, we conclude that neither the Tenth nor Eleventh Amendment bars these actions against the States of Oklahoma, New Mexico, and Kansas, and thus the district courts should proceed to

consider these claims on the merits. We further conclude that the claims in Ponca, Pueblo of Sandia, and Mescalero Apache against the governors of their respective states are inappropriate under the doctrine of Ex parte Young, and must therefore be dismissed. Accordingly, we AFFIRM the judgment in Kickapoo. We REVERSE IN PART and AFFIRM IN PART the judgments in Ponca, Pueblo of Sandia, and Mescalero Apache, and REMAND for further proceedings consistent with this option.

ORDER
Filed October 27, 1994

Before **ANDERSON, McKAY,** and **EBEL,** Circuit Judges.

IT IS HEREBY ORDERED that the opinion previously entered in this case is amended as follows:

1. The first sentence of the first complete paragraph on page 27 should be amended to read as follows with brackets indicating deleted material and the new material indicated by underlining, but it is not intended that the new material be underlined in the final text):

> "Under IGRA, if a state [ ] is found to have failed to negotiate in good faith with the Indian tribe to conclude a tribal-state compact, the Secretary of the Interior will ultimately prescribe and enforce regulations to govern Class III gaming.[16]."

2. The following additional material should be added to the end of footnote 17 on page 28 as follows:

> "We do not, in this opinion, address the extent to which the Secretary of the Interior is restricted by § 2710(d)(1)(B)(vii)(I), which authorizes the Secretary to prescribe

procedures "which are consistent with . . . the relevant provisions of the laws of the State." The cases before us have not yet reached the stage where the Secretary has attempted to fashion or impose any federal provisions regulating Indian gaming, and thus it is premature to speculate as to the nature of the Secretary's provisions or any restrictions that this provision may place upon the Secretary's response.

Entered for the Court

David M. Ebel
Circuit Judge

ORDER

Entered October 27, 1994

Before SEYMOUR, Chief Judge, McKAY, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judges.

This matter comes on the consideration of the joint petition of all appellees for petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. The court having been polled on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied. Judges Baldock, Brorby and Kelly voted to grant rehearing. Judge Henry is recused in this matter.

Entered for the Court

PATRICK FISHER
Chief Deputy Clerk

ORDER
Entered November 10, 1994

Before ANDERSON, McKAY and EBEL, Circuit Judges.

This matter comes on for consideration of the Joint Motion of the States of New Mexico, Oklahoma, and Kansas to Stay the Mandates.

Upon consideration thereof, it is ordered that the mandates are stayed until December 12, 1994, pending certiorari, and that if on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellees have timely filed petition(s) for writ(s) of certiorari in the Supreme Court, the stays shall continue until final disposition by the Supreme Court.

Entered for the Court

PATRICK FISHER
Chief Deputy Clerk

APPENDIX II

PONCA TRIBE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	CIV-92-988-T
v.	)	
	)	
STATE OF OKLAHOMA and DAVID WALTERS, GOVERNOR OF THE STATE OF OKLAHOMA, individually and in his official capacity,	)	
	)	
Defendants.	)	

ORDER

Plaintiff, the Ponca Tribe of Oklahoma (the "Tribe"), instituted this action against the State of Oklahoma and David Walters, both individually and in his official capacity as Governor of the State, pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. The Tribe contends the State of Oklahoma failed to conduct good-faith negotiations regarding a Tribal-State compact that would govern certain gaming activities to be conducted on the Tribe's land, and seeks an order compelling the State to conclude a compact with the Tribe. The defendants have filed a motion to dismiss, asserting that the action is barred by the State's Eleventh Amendment sovereign immunity; that the IGRA constitutes an unconstitutional interference with the State's sovereign contracting powers under the Tenth Amendment; and that no claim has been stated against the Governor in either his official or individual capacity.

The Indian Gaming Regulatory Act was passed by Congress "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments . . . " 25 U.S.C. § 2702(1). The IGRA divides Indian gaming into three classes. Class I gaming includes social games for prizes of minimal value and traditional forms of Indian gaming engaged in by individuals in connection with tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Class I gaming on Indian lands is not subject to the provisions of IGRA, but is within the exclusive jurisdiction of the tribes. § 2710(a)(1). Class II gaming includes bingo, pull-tabs, punch boards, tip jars and other games similar to bingo, and certain card games. § 2703(7)(A). Class II gaming is within the jurisdiction of the Indian tribes, but is subject to the provisions of IGRA. § 2710(a)(2).

Class III gaming consists of all other forms of gaming, § 2703(8), and Class III activities are lawful on Indian lands only if they are "located in a State what permits such gaming for any purpose by any person, organization, or entity . . . " and only if there are conducted in conformance with a Tribal-State compact. § 2710(d)(1)(B) and (C). IGRA specifies the procedure to be followed with respect to the formation of a compact:

> [a]ny Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a

> request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

§ 2710(d)(3)(A).

The act also provides that:

> [t]he United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian Tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith . . . .

§ 2710(d)(7)(A).

If, upon institution of a suit by a tribe, the court finds that the State has refused to negotiate in good faith, it "shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." § 2710(d)(7)(B)(iii). The court may consider, in determining whether the state has negotiated in good faith, the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities. § 2710(d)(7)(iii)(I).

If the State and Tribe do not conclude a compact within the sixty-day period, the Tribe and State "shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings of order of the court." § 2710(d)(7)(B)(iv). The mediator then

submits to both the State and the Indian tribe the compact he or she has selected. § 2710(d)(7)(B)(v). If the State accepts the mediator's proposed compact within sixty days after it is submitted, it will be treated as the Tribal-State compact. § 2710(d)(7)(B)(vi). If the State does not consent to the mediator's selected compact, the mediator notifies the secretary of the Interior, who, in consultation with the Tribe, establishes procedures under which Class III gaming may be conducted on the Indian Lands, which are consistent with the proposed compact selected by the mediator, the provisions of IGRA, and the relevant provisions of the laws of the State. § 2710(d)(7)(B)(b)(vii).

The court must now determine whether the suit filed by the Ponca Tribe under IGRA against the State of Oklahoma and its Governor is barred by the Eleventh and Tenth Amendments.

ELEVENTH AMENDMENT

The Eleventh Amendment[1] prohibits suit against a state by a private party, including one of its own citizens, by a foreign sovereign, or by an Indian Tribe. Blatchford v. Native Village of Noatak, ___ U.S. ___ (1991). States may, however, waive their Eleventh Amendment immunity and consent to suit in federal court, and, in certain cases, Congress may abrogate the States sovereign immunity. Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990).

The defendants argue that the State of Oklahoma has neither expressly nor implicitly waived its sovereign immunity to suit. Relying of Parden v. Terminal Railway of Alabama Docks Dept., 377 U.S. 184, 192-93 (1964), the Tribe responds that the State "constructively waived" its immunity. Parden is inapplicable, as it was premised on the theory that by becoming a common carrier in interstate commerce, the State of Alabama had entered a filed of economic activity that was federally regulated and had impliedly consented to be bound by that regulation and be subject to suit in federal court on the same terms as other

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[1]*The Amendment provides:*

> *The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of an Foreign State.*

While the language expressly encompasses only suits brought against the State by citizens of another State, the Supreme Court has held that the Amendment prohibits suits against a State by citizens of that same State as well. Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990).

regulated parties. Blatchford,[2] ___ U.S. at ___. Here the State has not voluntarily "[left] the sphere that is exclusively its own and entered[ed] into activities subject to congressional regulation." Id. at 196. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 246-47 (1985) (state did not consent to suit in federal court by accepting funds under the Rehabilitation Act). See generally Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 1992 WL 71384 (W.D Mich. 1992). In the absence of an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment," Atascadero, 473 U.S. at 238 n.1, the court concludes no waiver, express or implied, has occurred. See generally, id. at 239-41.

But, the absence of a waiver does not prevent Oklahoma from being amenable to litigation, as Congress may abrogate the States' constitutionally secured immunity from suit in federal court "by making its intention unmistakably clear in the language of the statute." Dellmuth v. Muth, 491 U.S. 223, 227-28 (1969). Accord Blatchford, ___ U.S. at ___. Therefore, the court must determine whether the Indian Gaming Regulatory Act abrogates the States' Eleventh Amendment immunity.

"A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." Atascadero, 473 U.S. 15 246. The fact that Congress has granted federal courts jurisdiction to hear a claim also is not sufficient to show Congress has abrogated all defenses to that claim.

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[2]Confusion that existed as to whether Parden was a consent or abrogation case was ended by Blatchford in which the Supreme Court rejected the theory that Parden was premised upon abrogation.

Blatchford, ___ U.S. at ___ n.4. However, by expressly providing in § 2710(7)(A) for federal jurisdiction over actions by Indian Tribes against States premised on their failure to negotiate or to negotiate in good faith, Congress clearly intended to subject the States to suit in federal court. Sault Ste. Marie Tribe of Chippewa Indians, 1992 WL 71384; Seminole Tribe of Florida v. Florida 1992 WL 200429 (S.D. Fla. 1992); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 557 (S.D. Ala. 1991). Defendants' argument to the contrary, in light of the "cascade of plain language," Pennsylvania v. Union Gas Co., 491 U.S. 1, 11 (1989), is unavailing.

Even if Congress intended to abrogate the States' immunity, defendant asserts that its action was invalid, that it lacked the power to subject the States to suit under IGRA. The Tribe contends that Congress possessed the requisite authority under the Indian Commerce Clause,[3] citing Union Gas Co., 491 U.S. at 13-23.

Union Gas is premised on Congress' power under the Interstate Commerce Clause. It was a sharply divided decision and, one of the bases for the Supreme Court's holding -- that the States waived their immunity under the "plan of the convention" -- was subsequently rejected by the Court in Blatchford, ___ U.S. at ___.

Only rarely has the Supreme Court acknowledged congressional power to abrogate State immunity. One instance already noted, is when it acts under the Interstate Commerce Clause; another is when it legislates pursuant to

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[3] *Article I, section 8, clause 3 of the United States Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."*

§ 5 of the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Congress possesses the constitutional power under § 5 of the Fourteenth Amendment to authorize damage actions in federal courts against States for violations of Title VII of the Civil Rights Act of 1964). As Union Gas is not directly on point, the court concurs with the other district courts that have declined to extend its rationale and equate Congress' plenary power under the Interstate Commerce Clause or § 5 of the Fourteenth Amendment, with its authority under the Indian Commerce Clause. Poarch Band of Creek Indians, 776 F. Supp. at 558-59; Spokane Tribe of Indians v. Washington, 790 F. Supp. 1057, 1060-61 (E. D. Wash. (1991); Sault Ste. Marie Tribe, 1992 WL 71384. Contra Seminole Tribe of Florida, 1992 WL 200429. This conclusion is bolstered by the Supreme Court's statement during the same term it decided Union Gas: "[i]t is well established that the Interstate Commerce and Indian Commerce Clauses have very different applications." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). Therefore, the court concludes the plaintiff's action against the State of Oklahoma is barred by the Eleventh Amendment. Whether the Amendment also prohibits the plaintiff's suit against the Governor is a separate issue.

Oklahoma's Governor, who has been sued in two capacities, initially asserts that the complaint does not state a claim against him as an individual. The plaintiff's failure to address this argument in its response, while perhaps a matter of oversight, more likely is indicative of the lack of any legal basis for its action against Governor Walters individually. It is, therefore, dismissed with prejudice.

The Tribe's claim against the governor in his official capacity cannot be as easily discounted. The plaintiff relies

on Ex parte Young, 209 U.S. 123 (1908) as authority for its suit against Governor Walters. Ex Parte Young held that an action to enjoin a state official's action, on the ground it was unconstitutional, is not barred by the Eleventh Amendment. However, as the defendant governor notes, the decision appears to have been applied in cases "[w]here the State itself or one of its agencies or departments is not named as defendant and where a state official is named instead..." Papason v. Allain, 478 U.S. 265, 276 (1986)(emphasis added). One commentator has stated that "if the plaintiff does not make the gross pleading error of naming the state as defendant, injunctive relief against a state officer is not prohibited." Laurence H. Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 687 (1976). Here, of course, the plaintiff has named the State as a defendant. Therefore, the pleading default might warrant the dismissal of the plaintiff's lawsuit against the governor in his official capacity. The court will proceed, though, to consider whether the governor, in his official capacity, can be subjected to suit or whether the Eleventh Immunity also bars the plaintiff's claim against him.

Under Ex parte Young, 209 U.S. at 158-59, a court can direct a state official to perform some duty that does not involve the exercise of discretion, but is merely ministerial. A court order to negotiate in good faith and conclude a tribal-state compact with the plaintiff clearly would infringe on executive discretion and fall outside the parameters of Ex Parte Young. Poarch Band of Creek Indians, 784 F. Supp. at 1549, 1551-52 (S.D. Ala. 1992). Consequently, the plaintiff's suit against the governor also is barred by sovereign immunity.

TENTH AMENDMENT

As an alternative basis for their motion, the defendants rely on the Tenth Amendment and its application in New York v. United States, ___ U. S. ___ (1992). "[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." Id. at ___.

The Court in New York considered whether Congress was improperly directing or motivating the states to regulate waste disposal in the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("Radioactive Waste Act"). Although Congress can urge a State, through various measures, to adopt a legislative program that conforms to federal interests, it cannot compel the state to regulate. Conditions may be attached on the receipt of federal funds or Congress may offer States the choice of regulating certain activity according to federal standards or having state law preempted by federal regulation. Id. at ___. The specific statutory provisions utilized by the legislature determine whether Congress has properly "encourage a "State to conform to federal policy choices," or impermissibly compelled state regulation. Id.

The Tribe and the State and governor offer vastly differing interpretations of IGRA. According to the defendants, "Congress, in enacting the Indian Regulatory Gaming Act, seeks to coerce the State in the exercise of its reserved contracting power" and "to commandeer the State's aid in regulating Class III gaming." Defendants' brief, pp 37, 39. As construed by the plaintiff, "the only thing

required by the IGRA is that an Indian tribe will be able to conduct some form of Class III gaming activities... If the State refuses to enter into a compact with the Tribe, no monetary penalties will be asserted by this court against the State for such refusal. The only penalty that can be assessed is indirect -- the state will have no voices in determining the benefits it is to receive from the Tribe's Class III gaming activities." Plaintiff's brief, p. 22.

Technically, the Act does offer a State a "choice" -- it may enter into a negotiated compact with a Tribe or possible[4] have a compact force on it. Here, as in its enactment of the take title provision of the Radioactive Waste Act of 1985, "Congress has crossed the line distinguishing encouragement from coercion." New York, ___ U.S. at ___. A critical alternative is missing in IGRA -- a State may not simply decline to regulate Class III gaming; it does not have the option of refusing to act. Significantly, both provisions of the Radioactive Waste Act that the Supreme Court upheld in New York as not intruding on the sovereignty reserved to the States, gave the States the option of not regulating radioactive waste disposal. Under IGRA, although a State will not necessarily be required to enact or enforce a regulatory program,[5] the possibility of compulsion, that a state government would be commanded by Congress, acting through the Secretary of Interior, to enact state regulation governing gaming, exists. Thus, the

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[4]*See n.5 infra. and accompanying text.*

[5]*For example, a suit filed by an Indian tribe to compel a State to negotiate may be dismissed, if the court concludes the State has negotiated in good faith or the procedures prescribed by the Secretary might not required the State to enact any legislation or establish any regulatory mechanism.*

court concludes that Act exceeds the powers of Congress,[6] and the plaintiff's suit against the State and its Governor is precluded by the Tenth Amendment.

As the court has found that the plaintiff's claim against the defendants is barred by the Eleventh and Tenth Amendments, the defendants' motion is granted. Accordingly, this action is dismissed.

IT IS SO ORDERED THIS 5th day of September, 1992.

s/
UNITED STATES DISTRICT JUDGE

[6]As the plaintiff does not seek to have the court sever and enforce other provisions of the Act, it is unnecessary for the court to render a decision regarding severability and the constitutionality of the remainder of the Act.

APPENDIX III

PROVISIONS OF 25 U.S.C. § 2710(d)

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall

adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the arrival of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (d) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution

revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any provision of this subsection---

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformation with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close

of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such of laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or

less stringent than, the State laws and regulations made applicable by the Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by the State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity,

and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of the Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause

(iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

Supreme Court, U.S.
FILED
JAN 13 1995
OFFICE OF THE CLERK

No. 94-1029

In The

Supreme Court of the United States

October Term, 1994

THE STATE OF OKLAHOMA,

Petitioner,

vs.

PONCA TRIBE OF OKLAHOMA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

In its Petition for Writ of Certiorari, the State of Oklahoma sets its questions presented for review against an Indian Gaming Regulatory Act which it claims compels, coerces and dictates the States to enter into gaming compacts with the Indian Tribes. (Pet. for Cert., p. i). However, the Indian Gaming Regulatory Act which the State of Oklahoma claims to exist is not the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), enacted by Congress and which is the law today.

IGRA provides the States the opportunity to negotiate and to enter into gaming compacts with the Indian Tribes and to thereby participate in the process of determining the procedures by which Tribal gaming activities will be conducted. However, the States are not forced to do so. IGRA provides no penalties or sanctions that can be levied against the States should they decline to enter into gaming compacts or even should they refuse to negotiate with the Tribes. In light of the actual IGRA enacted and in force today, the questions presented for review are more accurately stated to be:

I.

Whether Congress, in regulating Indian gaming under the Indian Commerce Clause, is empowered to abrogate the States' Eleventh Amendment immunity?

II.

Whether Congress, in granting the States the opportunity to negotiate and enter into gaming compacts with the Indian Tribes, unconstitutionally interfered with any powers reserved to the States under the Tenth Amendment?

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No. 94-1029

In The

Supreme Court of the United States

October Term, 1994

THE STATE OF OKLAHOMA,

Petitioner,

vs.

PONCA TRIBE OF OKLAHOMA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The questions presented for review in this case arise out of Congress' enactment of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"). A presumption of constitutionality attaches to every Act of Congress. *Walters v. National Association of Radiation Survivors,* 468 U.S. 1323, 1324 (1984); *Marshall v. Barlow's Inc.,* 429 U.S. 1347, 1348 (1977). Facial challenges to the constitutionality of an Act of Congress are the most difficult challenges to mount successfully,

since the challenger must establish that no set of circumstances exist under which the Act would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). In this case, Petitioner State of Oklahoma claims that the provisions of IGRA granting the States the opportunity to negotiate and to enter into gaming compacts with the Indian Tribes violate both the Eleventh Amendment and Tenth Amendment to the United States Constitution.

A. The Indian Gaming Regulatory Act's Intent to Grant the States the Opportunity to Participate in the Process of Determining the Procedures by Which Certain Tribal Gaming Activities Will Be Conducted

In 1987, this Court held that a State could not enforce its "civil/regulatory" gaming laws in a manner that would prohibit gaming on Indian lands within its borders. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The *Cabazon* decision left Indian gaming largely unregulated by the States; similarly, "existing federal law d[id] not provide clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3). In an attempt to insure adequate regulation and after contentious debate concerning the appropriate State role in the regulation of Indian gaming, Congress enacted IGRA. The primary purpose of IGRA is "to provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting Tribal economic development, self-sufficiency, and strong Tribal governments." 25 U.S.C. § 2702(1). In order to accomplish this goal, Congress defined classes of Indian gaming, 25 U.S.C. § 2703(6)-(8); established the National Indian Gaming Commission to monitor and regulate some forms of Indian gaming, 25 U.S.C. §§ 2704-2708; and provided a compacting procedure by which States might participate in the process of determining the regulations for certain forms of Indian gaming, 25 U.S.C. § 2710(d).

Briefly summarized, Congress divided Indian gaming into

three "classes." Class I gaming, which is governed and regulated solely by individual Indian Tribes, consists mainly of "social games solely for prizes of minimal value . . ." 25 U.S.C. § 2703(6). Class II gaming, which is subject to certain federal regulations, includes bingo and comparable games as well as non-banking card games where not prohibited by State law. 25 U.S.C. § 2703(7). Neither of these classes is relevant to the questions the State of Oklahoma seeks to have this Court review.

The questions presented for review arise from the third class of gaming. Class III gaming is defined residually; it includes "all forms of gaming that are not Class I gaming or Class II gaming." 25 U.S.C. § 2703(8). Specifically excluded from Class II, and therefore within the scope of Class III, are banking card games and "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B). Class III gaming is the type of gaming most profitable to the Indian Tribes; it is also the gaming over which the States want the greatest control.

In order to achieve a compromise between the interests of the States and the interests of the Indian Tribes, Congress mandated that Class III gaming activities would be lawful on Indian lands only when these activities are authorized by the Tribe; located in a State that permits such gaming for any purpose by any person or organization; and conducted in conformance with a Tribal-State compact. 25 U.S.C. § 2710(d)(1).[1] To ensure that dilatory actions

---

1. However, Congress' provision in IGRA for a Tribal-State compact did not constitute a mandate that the State regulate Tribal Class III gaming. As stated by Senator Evans:

> . . . [A] compact should be a negotiation between two sovereigns. It is entirely conceivable that a particular State will have no interest in operating any part of the

(Cont'd)

by the State could not preclude or unreasonably delay Indian gaming, IGRA delineated a negotiating process designed to culminate in the Tribal-State compact and provided mechanisms to remedy State misconduct.

B. The Tribal-State Compacting Mechanism and Its Use of the Federal Courts

Under IGRA, the Tribe initiates the compacting process by requesting that the State enter into negotiations for the purpose of concluding a Tribal-State compact governing the conduct of gaming activities. In IGRA, Congress directed that the State "shall negotiate with the Indian Tribe in good faith to enter into a compact." 25 U.S.C. § 2710(d)(3)(A). If these negotiations bear fruit, the compact must be approved by the Secretary of the Interior and published in the Federal Register. 25 U.S.C. § 2710(d)(8).

Congress also anticipated that Tribal-State negotiations would not always produce a mutually satisfactory compact. Congress therefore provided the Tribes with a remedy in the federal courts:

> (7)(A) The United States district courts shall have jurisdiction over —

(Cont'd)

> regulatory system needed for a Class III Indian gaming activity, and there will be no jurisdictional transfer recommended by the particular tribe and state. Each compact will need to consider, among other items, the experience and expertise of the particular tribe and State with gaming, and the existence of regulatory mechanisms within each government. Congress should expect a reasoned and rational approach to these compacts and not simply a demand that tribes come under a State [regulatory] system.

134 Cong. Rec. S12651 (daily ed. Sept. 15, 1988) (statement of Sen. Evans).

> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith . . .
>
> * * *
>
> (B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A) (i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3) (A).

25 U.S.C. § 2710(d)(7)(A)(i) and (B)(i). If the district court finds that the State has failed to negotiate in good faith, that court "shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. § 2710(d)(7)(B)(iii). If that fails, "the Indian tribe and the State shall each submit to a mediator appointed by the Court a proposed compact that represents their last best offer for a compact." 25 U.S.C. § 2710(d)(7)(B)(iv). The mediator then selects the better of the two proposals and submits it to the Indian Tribe and the State. The State then either may consent to the compact within sixty days, in which case the compact is treated as if it were the product of negotiations; or may refuse to consent, in which case the Secretary of the Interior in consultation with the Tribe prescribes procedures by which to regulate the Tribe's Class III gaming. 25 U.S.C. § 2710(d)(7)(B)(vi) and (vii).

IGRA thus provides the State with a choice — to negotiate in good faith with the Indian Tribe for a compact to govern the Tribe's Class III gaming activities or to not negotiate and allow the Secretary of the Interior and the Tribe to promulgate

procedures governing the Tribe's gaming. Should the State elect not to negotiate, IGRA does not authorize the federal government to impose a penalty on the State nor does it authorize an award of damages to the Tribe. Thus rather than being coerced or compelled to compact with the Tribe, IGRA provides the State with an opportunity that under *Cabazon* and pre-IGRA it did not have, to enter into negotiations with the Tribe and to participate in the process of determining the procedures by which Tribal gaming activities will be conducted.

REASONS FOR DENYING THE WRIT

In its decision, the Court of Appeals for the Tenth Circuit reversed the District Court for the Western District of Oklahoma, holding that in enacting IGRA, Congress was empowered under the Indian Commerce Clause to abrogate the States' Eleventh Amendment immunity and that IGRA's provisions directing the States to negotiate for gaming compacts with the Indian Tribes did not violate the Tenth Amendment powers reserved to the States (Pet. for Cert., pp. 1a-40a). The Court's review of the Tenth Circuit's decision is not warranted because:

1. There is no split among the circuits on the issue of IGRA violating the Tenth Amendment.

2. The request for review is predicated on an Indian Gaming Regulatory Act which compels, coerces and dictates that the States enter into gaming compacts with the Indian Tribes; however, IGRA is wholly lacking in the penalties or sanctions which would compel or coerce the States to enter into gaming compacts with the Tribes.

I.

THERE IS NO SPLIT AMONG THE CIRCUITS ON THE ISSUE OF IGRA VIOLATING THE TENTH AMENDMENT.

The State of Oklahoma asserts that its Petition for Writ of Certiorari should be granted because the decision by the Tenth Circuit conflicts with the decision of the Eleventh Circuit in *Seminole Tribes of Florida v. Florida,* 11 F.3d 1016 (11th Cir. 1994) (Pet. for Cert., pp. 11-14). As to the issue of whether Congress was empowered under the Indian Commerce Clause to abrogate the States' Eleventh Amendment immunity, the *Seminole Tribes* decision differs from that of the Tenth Circuit. However, the Eleventh Circuit expressly declined to rule on the issue of IGRA violating the Tenth Amendment. *Seminole Tribes* at p. 1019, fn. 2. Furthermore, none of the other circuit courts of appeals decisions cited by the State of Oklahoma conflicts with the Tenth Circuit's decision that IGRA does not violate the Tenth Amendent.[2] Accordingly, review by the Court of the Tenth Circuit's decision that IGRA does not violate the Tenth Amendment is not necessary to resolve a conflict among the circuit courts of appeals.

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2. Circuit decisions cited by the State of Oklahoma include *Spokane Tribe of Indians v. Washington State,* 28 F.3d 991 (9th Cir. 1994) (held only that Congress expressed an intent and possessed the power to abrogate the State's Eleventh Amendment immunity when it enacted IGRA); *Cheyenne River Sioux Tribe v. South Dakota,* 3 F.3d 273 (8th Cir. 1993) (held that the Tribe's action under IGRA was not barred by Eleventh Amendment immunity and that IGRA did not violate the Tenth Amendment); and *Ysleta del sur Pueblo v. Texas,* 26 F.3d 1325 (5th Cir. 1994) (dismissing the Tribe's suit on other grounds).

II.

THE REQUEST FOR REVIEW IS PREDICATED ON AN INDIAN GAMING REGULATORY ACT WHICH COMPELS, COERCES AND DICTATES THE STATES ENTER INTO GAMING COMPACTS WITH THE INDIAN TRIBES; HOWEVER, IGRA IS TOTALLY LACKING IN THE PENALTIES OR SANCTIONS WHICH WOULD COMPEL OR COERCE THE STATES TO ENTER INTO GAMING COMPACTS WITH THE TRIBES.

Congress' complete or plenary authority to regulate Indian affairs, and the States' total lack of such authority, was established by the Indian Commerce Clause of the United States Constitution, which provides:

> *Section 8.* The Congress shall have Power ... To regulate Commerce ... with the Indian Tribes.

U.S. Const. art. I, § 8, cl. 3.

In *United States v. 43 Gallons of Whiskey,* 93 U.S. 188 (1876), the Court broadly construed Congress' plenary authority, stating "As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal . . ." *Id.* at p. 195. Subsequently, in *Dick v. United States,* 208 U.S. 340 (1908), the Court stated, "Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes — a power as broad and free from restrictions as that to regulate commerce with foreign nations." *Id.* at p. 356. And more recently in *County of Oneida, New York v. Oneida Indian Nation of New York,* 470 U.S.

226 (1985), the Court stated, "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Id.* at p. 234. The States' lack of authority over the Indian Tribes in regards to gaming was recognized in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), wherein the Court held the States could not enforce their "civil/ regulatory" gaming laws on Indian lands within their borders. Thus, prior to 1988, only Congress had the power to regulate Tribal gaming; conversely, the States had no power or right to participate or be involved in gaming activities by the Indian Tribes on Indian lands.

Following *Cabazon,* a large outcry arose from the States over the decision. In response thereto, but only after contentious debate concerning the appropriate State role in Indian gaming, Congress enacted IGRA in 1988. IGRA divided Indian gaming into three classes. Only with Class III gaming, which included banking card games and electronic or electromechanical facsimiles of any game of chance or slot machines, were the States given any opportunity to be involved or participate in Indian gaming.

The parameters of the States' opportunity to participate in Class III gaming were set forth in 25 U.S.C. § 2710(d). Therein, IGRA provided that an Indian Tribe could engage in Class III gaming activities only if such activities were "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1)(C). However, in establishing the requirement for a Tribal-State compact, Congress did not intend to give the States veto power over Tribal Class III gaming activities. Accordingly, Congress created an elaborate compacting mechanism intended to give the States the opportunity to participate in the process by which Class III gaming activities would be conducted, but would not allow the States to preclude the Tribes from engaging in Class III gaming.

The mechanism for creating a Tribal-State compact begins by the Tribe requesting the State to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. 25 U.S.C. § 2710(d)(3)(A). Should the Tribe and the State successfully negotiate a compact, the compact becomes effective upon its approval by the Secretary of the Interior and notice of the approval is published in the Federal Register. 25 U.S.C. § 2710(d)(3)(B). The Secretary of the Interior may disapprove a compact only if the compact violates:

1. IGRA;

2. any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands; or

3. the trust obligations of the United States to the Tribe.

25 U.S.C. § 2710(d)(8)(B).

Should the Tribe and the State fail to conclude and enter into a compact within 180 days after the Tribe requests the State to enter into negotiations, the Tribe may initiate a cause of action against the State. 25 U.S.C. § 2710(d)(7)(B)(i). Jurisdiction for such actions is vested in the United States district courts. 25 U.S.C. § 2710(d)(7)(A)(i).

Should the district court find that the State has negotiated in good faith with the Tribe, the action is dismissed. Only should the district court find that the State has not negotiated in good faith does IGRA provide for further proceedings in the action. In such event, the district court is to order the Tribe and the State to conclude a compact within 60 days. 25 U.S.C. § 2710(d)(7)(B)(iii).

IGRA recognizes that despite the district court order, the

Tribe and the State may still be unable to conclude a compact. Should the compact not be concluded within the 60-day period, the district court is authorized to appoint a mediator and the Tribe and the State are to each submit to the mediator a proposed compact that represents their last best offer for a compact. The mediator shall then determine and select the compact which best comports with IGRA, other applicable federal law and with any findings and order of the district court. 25 U.S.C. § 2710(d)(7)(B)(v).[3] Upon making its determination, the mediator shall submit the selected compact to the Tribe and the State. 25 U.S.C. § 2710(d)(7)(B)(v).

If within 60 days of receiving the submitted compact the State consents to the compact, the compact shall become effective upon approval by the Secretary of the Interior and publication of the approval. 25 U.S.C. § 2710(d)(7)(B)(vi). If the State does not consent within the 60-day period, the mediator shall so notify the Secretary of the Interior. Following receipt of the notice, the Secretary, in consultation with the Tribe, shall prescribe procedures — consistent with the compact selected by the mediator, IGRA and the relevant provisions of the State's law — under which the Tribe may conduct Class III gaming. 25 U.S.C. § 2710(d)(7)(B)(vii).[4]

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3. As with a refusal by the State to conclude a compact with the Tribe within 60 days as prescribed by the district court order, IGRA provides for no penalty or sanction should the State refuse to submit a proposed compact to the mediator. In such event, the mediator shall presumably select the Tribe's compact as being the compact which best comports with IGRA and the other criteria.

4. The State of Oklahoma asserts that should the Secretary of the Interior prescribe procedures for the conduct of a Tribe's gaming, the State will be "subject to the Secretary of the Interior's dictation of [its] regulatory role in regulating Indian gaming." (Pet. for Cert., p. 20). However, there is no requirement in IGRA that the State regulate Tribal gaming activities; thus, any

(Cont'd)

The State of Oklahoma claims the IGRA compacting mechanism compels and coerces the State to negotiate and enter into compacts with the Tribes and to regulate Tribal gaming activities. In reliance thereon, the State further claims that such compulsion and coercion provides the basis for finding IGRA violates both the Eleventh Amendment and the Tenth Amendment (Pet. for Cert., pp. i and 14-22). However, other than making these claims, the State is unable to point to any provision in IGRA which compels or coerces it to do anything or which provides that the State is to regulate the Tribe's Class III gaming activities.

Review of IGRA regarding Class III gaming and the Tribal-State compacting mechanism reveals that the only requirement in IGRA is that the Tribe request the State to enter into negotiations for a compact. After that one requirement, the State can elect to negotiate in good faith or decline to negotiate for a compact. Should the State negotiate in good faith, it will have the opportunity to participate in the process of determining the procedures by which Tribal Class III gaming activities will be conducted. Should the State decline to negotiate, procedures for the conduct of Class III gaming by the Tribe will be prescribed by the Secretary of the Interior. And by virtue of its plenary powers over Indian affairs, there is no question that Congress can delegate to the Secretary of the Interior the power to promulgate procedures for the conduct of gaming by the Tribes.

(Cont'd)
concern that the Secretary may direct the State to do so is premature. Second, in the absence of such a requirement in IGRA, the Secretary of the Interior is not empowered to direct the State to regulate Tribal gaming activities nor to grant to the State the civil/regulatory jurisdiction that would be required. Should the Secretary of the Interior do so, the Secretary would be in violation of the principles set forth in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), wherein the Court recognized that the grant of jurisdiction to the State over Indian lands must be clearly consented to by the express language of Congress.

Rather than coercing or compelling the States, IGRA provides the State with a choice — to negotiate in good faith with the Indian Tribe for a compact to govern the Tribe's Class III gaming activities or to decline to negotiate and allow the Secretary of the Interior to prescribe procedures governing the Tribe's gaming. Should the State decline to negotiate, IGRA does not authorize the courts or the federal government to sanction or impose a penalty on the State nor does it authorize an award of damages to the Tribe. Thus instead of being coerced or compelled, IGRA provides the State with an opportunity it did not have prior to the enactment of IGRA — to enter into negotiations with the Tribe and to participate in the process of determining the procedures by which Tribal Class III gaming will be conducted.

Absent the compulsion or coercion the State claims exists in IGRA, there is no foundation to the constitutional challenges the State of Oklahoma has made to IGRA and no meritorious reason for the Court to grant the State's Petition for Writ of Certiorari.

CONCLUSION

The State of Oklahoma has failed to provide a reason for this Court to review the questions it has presented. As to its claim that IGRA violates the Tenth Amendment, the State is unable to show any conflict among the circuit courts of appeals with the Tenth Circuit's decision that IGRA does not violate the Tenth Amendment. In regards to the State's claim that IGRA compels and coerces it to compact with the Indian Tribes and to regulate Tribal gaming, the State has not and is unable to cite any provision in IGRA which compels or coerces the State to take any action. The State's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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THE STATE OF OKLAHOMA, et al.,

Petitioners,

v.

PONCA TRIBE OF OKLAHOMA,

Respondent.

On Petition For Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ARIZONA, ARKANSAS, CONNECTICUT, FLORIDA, IDAHO, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, PENNSYLVANIA, RHODE ISLAND, TEXAS, VERMONT AND WYOMING IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

i. Does Congress have the power to abrogate the States' Eleventh Amendment immunity when legislating under its plenary powers in the Indian Commerce Clause, subjecting States to suits by Indian tribes to compel the States to perform acts to benefit the tribes?

ii. Has Congress impermissibly compelled the States in the Indian Gaming Regulatory Act to exercise their discretion and perform solely federal regulatory functions in violation of the Tenth Amendment?

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To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ARIZONA, ARKANSAS, CONNECTICUT, FLORIDA, IDAHO, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, PENNSYLVANIA, RHODE ISLAND, TEXAS, VERMONT AND WYOMING IN SUPPORT OF PETITIONERS

INTEREST OF AMICI STATES

This case goes to the heart of our federal system of government – the relationship of States of the Union and the Federal Government. At issue is the ability of the federal Congress directly to mandate that the States exercise their legislative discretion in a certain way and compel them to perform solely federal regulatory functions.

Congress has done so by displacing and dismissing the States' sovereign interests – firstly, by commanding the States to negotiate with Indian tribes to regulate gambling activities, and secondly, by subjecting States to suit in federal court without their consent in order to compel these negotiations. Only this Court is poised to protect vital interests of state sovereignty.

This Court is presented here and in related cases for the first time with the question whether Congress has the power to abrogate the states' Eleventh Amendment immunity under the *Indian* Commerce Clause, article I, section 8, clause 3 of the United States Constitution. While the power to abrogate has been found in Section 5 of the Fourteenth Amendment and in the *Interstate* Commerce Clause, this Court has not uncovered to date any other provision that permits the Congress to annul the judicial sovereign immunity of the states found in the Eleventh Amendment.

Moreover, the sovereign interests of the majority of the States – those with Indian lands as defined by Congress – are seriously jeopardized by the method chosen by the Congress to implement this legislation. The congressional mandate here subjects the States to the raw dictates of the federal government, enforced by the federal courts, and treats the States as mere subdivisions of a national government in violation of the Tenth Amendment. No choice, incentive or acceptable alternative is given a State under this legislation. States must comply or face federal court orders. The interest of amici States is thus obvious and paramount.

Amici States share an immediate and profound concern with the difficult and irregular implementation of an over-reaching Act of Congress and the corresponding proliferation of conflicting federal appellate and district court decisions interpreting that Act. Only this Court can resolve these conflicts. These cases arise under the provisions of the Indian Gaming Regulatory Act, Pub.L. No.

100-497, 102 Stat. 2467 (codified at 18 U.S.C. §§ 1166-1168 and 25 U.S.C. §§ 2701-2721) (hereinafter IGRA). Each amicus state has lands (or may have lands taken in the future by the federal government) that fall within the definition of "Indian lands" under 25 U.S.C. § 2703(4). Each of these states allows or may allow in the future some form of gaming to be operated within its respective borders. The forms of gaming that are permitted, prohibited or regulated differ from state to state, as these are matters solely of state law. Most amici states have been or may become involved in negotiations for tribal-state compacts for gaming to be operated on such lands, as required by IGRA.[1] These negotiations have resulted in highly divergent results from state to state – including, in some states, compacts for Indian gaming operations which are prohibited to the citizens of the state at large. More commonly, the result is lawsuits filed against states in federal court by Indian tribes demanding the states compact for casino gambling even where it is criminally prohibited. While it is in the latter category that this particular suit arises – in the State of Oklahoma – other states similarly situated fear the same federal court compulsion to permit that which they criminally prohibit. This Court already has before it the petitions and cross-petitions of the States of Alabama, Florida, Kansas and Washington, in independent cases, but all arising from demands by Indian tribes to negotiate for forms of gambling criminally prohibited in those states. Under this Act of Congress, all the States are witnessing a grave degradation of their jurisdiction and possess a vital interest in having this Court protect their state sovereignty.

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[1] Amici states Maine and Massachusetts contend they are not subject to IGRA, based on their respective Indian land claims settlement acts.

Each of the amici States now faces the prospect in certain federal circuits that they may be subjected to suit in federal court without their consent and against their will by Indian tribes in violation of the Eleventh Amendment to the United States Constitution, compelling them to perform acts which the Congress can not lawfully require under the Tenth Amendment.

SUMMARY OF ARGUMENT

The Tenth Circuit's holding that Congress has the power to abrogate the state's Eleventh Amendment immunity when legislating pursuant to the Indian Commerce Clause is at odds with the holding of the Eleventh Circuit in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (1994), that Congress has no such power. *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422, 1430 (10th Cir. 1994). Certiorari should be granted to resolve conflicts between the Eighth, Ninth, Tenth and Eleventh Circuits, as the varying and disparate interpretation and application of the Indian Gaming Regulatory Act of 1988 ("IGRA") by the federal courts has left states with no guidance with respect to the Act. Resolution of these questions is of profound consequence to the states concerned.

The federal circuits have differed sharply on their reading of and the arguable application of *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), to cases involving federal legislation under the Indian Commerce Clause. In that case, this Court held that Congress may abrogate state sovereign immunity based on its power under the Interstate Commerce Clause; the Tenth Circuit, however, read the two commerce clauses as having equal value, and thus, applied *Union Gas* to Indian Commerce Clause legislation. The States have a vital interest in protecting their sovereign immunity against further encroachment by federal legislation that subjects them to suit in federal court,

and argue that this Court should grant certiorari in order to settle the question whether Congress can freely abrogate Eleventh Amendment immunity under the Indian Commerce Clause.

The States also argue that this Court has only upheld the congressional abrogation of state sovereign immunity where Congress' power to enact legislation under the Constitution would be incomplete without subjecting states to suit in federal court. IGRA presents no such necessity to subject states to suit by Indian tribes in order to accomplish its regulation of Indian gambling, a matter under its complete and plenary authority over Indian affairs in the Constitution. As argued, Congress sidestepped federal regulation of these matters and instead enacted a scheme that directly coerces the States to carry out a federal regulatory scheme as if the States were mere subdivisions of the national government, in violation of the Tenth Amendment and the principles of *New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408 (1992). IGRA's compulsion of the States to negotiate tribal-state gambling compacts and its sanction of a lawsuit in federal court to compel the negotiations and compacting is a definitive example of a Tenth Amendment violation enforced by an Eleventh Amendment violation.

ARGUMENT

I.

THE STATES HAVE A VITAL INTEREST IN THIS COURT RESOLVING THE CONFLICT IN THE FEDERAL CIRCUITS ON THE POWER OF CONGRESS TO ABROGATE STATE SOVEREIGN IMMUNITY WHEN USED TO COMPEL THE STATES' PERFORMANCE

The holding by the Tenth Circuit that Congress has the power to abrogate the state's Eleventh Amendment immunity under the Indian Commerce Clause is at odds with the holding of the Eleventh Circuit in *Seminole Tribe*

of Florida v. Florida, 11 F.3d 1016 (1994), that Congress has no such power. That disparity gives three states – Alabama, Georgia and Florida – the benefit of a rule that bars Indian tribes from suing these states under IGRA in federal court without their consent, while the six states with Indian tribes in the Tenth Circuit -- Colorado, Kansas, New Mexico, Utah and Wyoming – live under a different rule established in this case and stand subject to suit under the provisions of IGRA without their consent. The consequences of a state being subject to suit in federal court under IGRA is significant, as it may lead to secretarial adoption of a proposed tribal-state compact not agreed to by the state or federal regulations that may require the state to conduct or regulate activities against its will. Additionally, states in the Eighth and Ninth federal appellate circuits are subject to the same rule now found in the Tenth Circuit. This disparity in the application of the same federal law is of profound consequence to the states concerned. Such a conflict among the circuits is within the scope and character of the reasons for granting certiorari in Supreme Court Rule 10.1(a). Indeed, the conflict can only be resolved by this Court.

This Court has recognized that the Eleventh Amendment generally bars suits against a state by an Indian tribe. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S. Ct. 2578, 2581-83 (1991). The Eleventh Amendment is only emblematic of the states' sovereign immunity, which is itself "part of the understood background against which the Constitution was adopted, . . . " *Pennsylvania v. Union Gas*, 491 U.S. 1, 32 (1989)(Scalia, J., concurring in part and dissenting in part); *see also Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 487 (1987). Before Congress can effectively abrogate a State's immunity, it must have constitutional authority to do so. *Green v. Mansour*, 474 U.S. 64, *reh'g denied* 474 U.S. 1111

(1985) ("States may not be sued in federal court unless . . . Congress, *pursuant to a valid exercise of its power,* unequivocally expresses its intent to abrogate the immunity." Emphasis added.); *Blatchford,* 111 S. Ct. at 2584; *see also Atascadero State Hosp. & California Dep't of Mental Health v. Scanlon,* 473 U.S. 234 (1985); *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985).

Here, the Tenth Circuit followed the conclusion of the Ninth Circuit in finding that the power of Congress to abrogate state sovereign immunity under the *Interstate* Commerce Clause, as found in the plurality decision in *Union Gas,* 491 U.S. 1, is equally applicable under the *Indian* Commerce Clause, found in article I, section 8, clause 3 of the U.S. Constitution. *Ponca Tribe,* 37 F.3d at 1430; *see Spokane Tribe of Indians v. State of Washington,* 28 F.3d 991, 996 (9th Cir. 1994). The Ninth Circuit went further and suggested that the *Union Gas* plurality framed its analysis in terms of the Commerce Clause as a whole, and did not limit it to the interstate Commerce Clause. This application of *Union Gas* to the Indian commerce prong differs sharply from that of the Eleventh Circuit in *Seminole,* where the court noted that the *Union Gas* Court in each of its opinions – plurality, concurrences and dissents – addressed only the interstate prong, and that its rationale goes only to the regulation of commerce *among the states.* 11 F.3d at 1027.

A. Plenary Power Alone Does Not Give Congress the Power to Abrogate State Sovereign Immunity.

The Tenth Circuit rests its application of *Union Gas* to the Indian Commerce Clause on the notion that that clause embodies a plenary power of the Congress that limits the power of the states, citing *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976)(finding congressional power to

abrogate under § 5 of the Fourteenth Amendment), and *Union Gas*, 491 U.S. at 19 (plurality opinion)(like the Fourteenth Amendment, the "Commerce Clause withholds power from the States at the same time as it confers it on Congress.") Under this reasoning, any Article I power granted to the Congress by the States in the Constitution, which power in some way withholds power from the States, serves as a basis for congressional power to abrogate state sovereign immunity – rendering the Eleventh Amendment superfluous.[2]

In fact, without conceding the wisdom of Union Gas, the plurality in that case provided an important limitation on the power of Congress to summarily override a state's Eleventh Amendment immunity, found in the continuation of the sentence that refers to the withholding of power from the States while conferring it on Congress. Thus, where

> . . . the congressional power thus conferred *would be incomplete* without the authority to render the States liable in damages, it must be, that to the extent that the States gave Congress the authority to regulate commerce, they also relinquish their immunity where Congress found it necessary, in the exercise of this authority to render it liable.

Union Gas, 491 U.S. at 12-20. In other words, the power to abrogate was found to exist only because Congress'

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[2] As Justice Scalia noted in *Union Gas*:

> [I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers. An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable.

Pennsylvania v. Union Gas, 491 U.S. at 42 (Scalia, J., concurring in part and dissenting in part).

power would be incomplete without rendering the states liable in federal court – all in order to accomplish the purpose of its legislation under the Interstate Commerce Clause. *Union Gas* considered Congress' enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), providing means to clean up hazardous waste sites throughout the country. The Act provided who would be liable for the cost of remedial action, and Congress, legislating under the Interstate Commerce Clause, found it was *necessary* to hold the states financially accountable for certain costs of this remedial action. The remedial action would be incomplete without making the states liable *in federal court*.[3]

Similarly, in *Fitzpatrick*, as in *Union Gas*, Congress' power to enforce Title VII of the Civil Rights Act of 1964 was incomplete without the power to make the states, as employers, *liable in federal court* for damages and attorneys fees for unlawful employment discrimination. *Fitzpatrick*, 427 U.S. at 456 ("Congress may . . . provide for private suits against States or state officials which are constitutionally impermissible in other contexts."). Thus, the power to abrogate arises only where Congress's power, when legislating pursuant to Section 5 of the Fourteenth Amendment or the Interstate Commerce Clause, is incomplete without subjecting states to suit for damages in federal court.

In both *Fitzpatrick* and *Union Gas*, this Court has permitted the abrogation of state sovereign immunity only to the extent it permitted suits for damages. To date,

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[3] While the States may be of the view that *Union Gas* is flawed in upholding an Article I congressional power to abrogate state sovereign immunity, it is nonetheless clear that interstate commerce power *standing alone* does not confer power to abrogate the states' Eleventh Amendment immunity.

this Court has not sanctioned congressional abrogation of a state's Eleventh Amendment immunity under any prong of the Commerce Clause permitting the state to be sued in federal court simply to compel it to perform an act mandated by Congress. Yet, that is precisely what IGRA attempts to do:

> If, in any action described in subparagraph (A)(i), the [district] court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, *the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period.* . . . If a State and Indian tribe fail to conclude a Tribal State compact . . . within the 60-day period provided in the order of the court . . . , the Indian tribe and *the State shall submit to a mediator appointed by the court a proposed compact* . . .

25 U.S.C. § 2710(d)(7)(B)(iii)-(iv). While the plenary power of the Congress with respect to Indian affairs may displace the power of the States with respect to Indians, the Indian Commerce Clause does not allow Congress to abrogate state sovereign immunity solely to compel a State to perform an act otherwise within the scope of the federal government to perform. This use of the federal courts to compel the States' performance offends not only the Eleventh Amendment, but also the Tenth Amendment, as discussed in Argument II, below.

Further, the Tenth Circuit lightly dismissed the analysis of the Eleventh Circuit in *Seminole* of the important distinctions in the respective purposes of Interstate Commerce Clause and the Indian Commerce Clause, noting the analysis was not on point as to the power to abrogate. However, the *Seminole* court aptly noted

> In [*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192], the Court acknowledged the plenary powers under the Interstate Commerce

> Clause that allow Congress to place limits on the states [was] in order to "maintain[] free trade among the States." *Id.* By contrast, "the central function of the Indian Commerce Clause is to provide Congress with power to legislate in the field of Indian affairs. *Id.* Although Congress has the power to limit the states under the Indian Commerce Clause as well, the different purposes underlying the two clauses mandate they be treated distinctly.

11 F.3d at 1027. These sharply different readings of the *Union Gas* opinion and the diametrically opposed conclusions as to abrogation power under the Indian Commerce Clause leave the states with no guidance as to whether suits by tribes against the states, without the consent of the states, are jurisdictionally barred or not.[4]

B. The States Did Not Contemplate in the Plan of the Convention that Article I Powers Include the Ability of Congress to Abrogate State Sovereign Immunity.

Finally, the Tenth Circuit also lightly dismissed this Court's analysis of states' Eleventh Amendment immunity from suits by an Indian tribe in *Blatchford v. Native Village of Noatak*, 111 S. Ct. at 2581-83. It is true that the

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[4] The Eighth Circuit also presents a conflict with the Eleventh Circuit on this same issue. In *Cheyenne River Sioux v. State of South Dakota*, 3 F.3d 273 (1993), the Eighth Circuit relied on the decision of the district court in *Seminole Tribe of Florida*, reversed by the Eleventh Circuit, for the notion that the Indian Commerce Clause provided the congressional power to abrogate the states' sovereign immunity. 3 F.3d at 280-81.

Blatchford court had no occasion to consider whether Congress had the power to abrogate under the Indian Commerce Clause, as it found no statutory expression of clear and unequivocal intent to abrogate; the Court did not need to reach the question of the existence of the congressional power. 111 S. Ct. at 2584. *Blatchford*, however, did conclude there was no *waiver* of state sovereign immunity "inherent in the plan of the convention," noting

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States [citation omitted], as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 111 S. Ct. at 2582-83, emphasis in original.

While this holding on *waiver* does not answer directly whether Congress has the power to *abrogate* state sovereign immunity under its plenary powers in the Indian Commerce Clause, it is a compelling indirect answer that Congress does not have that power. When the States compacted with a federal government and gave certain powers over to it, reserving others, how could the States have contemplated Congress nullifying that immunity which they did not surrender for the benefit of Indian tribes? Obviously, abrogation comes into play only where there is no waiver, but this Court's reasoning in *Blatchford* demonstrates the States did not contemplate that granting power to Congress for Indian commerce would subject the States to suit in federal court by Indian tribes to

compel the States to perform certain acts for the benefit of Indians tribes.

In sum, amici States have a vital interest in the resolution of the question presented by the Tenth Circuit, as it goes to the fundamental relationship of the States with the Federal Government, presenting important questions of federalism. To date, this Court has found Congress' power to abrogate only in Section 5 of the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445, and in the *Interstate Commerce Clause, Union Gas*, 491 U.S. 1. The significance of finding yet another constitutional provision that gives the Congress power to abrogate state sovereign immunity, one that permits the courts to compel States to perform certain acts, cannot be understated – it would lead to a critical undermining of our federal system of government and further strengthen the power of the federal government at the expense of the states. *Delmuth v. Muth*, 491 U.S. 223, 227-28 (1989). The resolution of this question, then, falls within the scope and character of the reasons for granting certiorari under Supreme Court Rule 10.1(c), as an important question of federal law not settled by this court.

II.

THE TENTH AMENDMENT PROHIBITS APPLICATION OF THE COERCIVE PROVISIONS OF THE IGRA

In IGRA, Congress directly commands the States to negotiate and implement a tribal-state scheme that deprives the States of their sovereign role, in violation of the Tenth Amendment. Under the Act, an Indian tribe retains the sovereign prerogative to request state participation in the regulation of gaming activities on Indian lands. 25 U.S.C. § 2710(d)(1)(C). If an Indian tribe requests a State to negotiate for a compact concerning

class III gaming, the State "*shall* negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). The federal government, while it has plenary authority for Indian affairs, assumes little or no responsibility for the formulation or implementation of a regulatory scheme for this Indian gaming.

The *coercive* elements of 25 U.S.C. § 2710(d)(3), *requiring* states to negotiate, under pain of federal court compulsion, reduce the States to mere administrative subdivisions of the Federal Government and do injury to their sovereignty. IGRA requires the States to exercise their sovereign discretion and carry out duties which the federal government refuses to do itself. As this Court most recently reaffirmed in *New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408 (1992):

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. . . . The Constitution instead leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment.

112 S. Ct. at 2434 (citations omitted).

The federal government may not *compel* a State to regulate in an area of federal responsibility. Indeed, "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." 112 S. Ct. at 2429 (emphasis added). When it comes to handling certain affairs, the States expressly vested in *Congress* responsibility for regulating commerce "with foreign nations, and among the several states, and with the Indian tribes." U.S. Const., art. I, § 8, cl. 3. Amici do not

believe that article I of the Constitution authorized Congress to avoid its obligation by forcing the several States to in effect enter into treaties with Indian tribes.

Instead, Congress chose to compel a state to negotiate a tribal-state compact under 25 U.S.C. § 2710(d)(3)(A), at the request of a tribe; to subject that state to being hauled into federal court under a claim that it failed to negotiate in good faith under 25 U.S.C. § 2710(d)(7); to subject the state to the compulsion of a federal court order to further negotiate; to subject the state to compulsion to submit a last best offer to a court-appointed mediator; and to require the state to make a selection from the mediator. 25 U.S.C. § 2710(d)(7).

Congress may, of course, pursuant to its plenary authority over Indian affairs, *encourage* the aid of the States in regulating the conduct of gaming activities on Indian lands. *Red Lake Band of Chippewa v. Swimmer*, 740 F. Supp. 9, 13-14 (D.D.C. 1990), *aff'd, Red Lake Band of Chippewa v. Brown*, 928 F.2d 467 (D.C. Cir. 1991). Congress may, of course, encourage a state to regulate in a certain way, short of outright coercion. Under its spending power, "Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1936). Where Congress has the authority to regulate private activity under the Commerce Clause, Congress may offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981). Neither such incentive is present under IGRA.[5]

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[5] In *Hodel*, the Court considered whether the "steep slope" provisions of the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (1988), commandeered the states' sovereign ability to regulate land use. There, unlike this case, the Act

When Congress conscripts states into fashioning and implementing a regulatory scheme to achieve federal ends, congressional representatives avoid political accountability. In IGRA, the scheme created by Congress minimizes the accountability of federal officials to the public. The legislation mandates that the States "work it out" with the tribes. It is thus the *State* officials who must bear the brunt of public disapproval, while congressional representatives – and, of course, the Secretary of the Interior, who ultimately approves the regulatory scheme, 25 U.S.C. § 2710(d)(8) – remain insulated from the political consequences of the conduct of gaming on Indian lands.

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provided for a federal regulatory scheme that could be implemented in full force by the Federal Government; if States did not wish to participate, the full regulatory burden would then be borne by the Federal Government. *See New York v. United States*, 112 S. Ct. 2408, 2420 (1992). States are free to choose whether to consider the incentives to participate or to not participate; they are always free under the Act to enact and administer their own regulatory programs within limits established by federal minimum standards. Similarly, in *FERC v. Mississippi*, 456 U.S. 742 (1982), the Congress passed the Public Utilities Regulatory Policies Act (PURPA) of 1978, to encourage States in various ways to develop programs to combat the then so-called energy crisis. This Court found no "command" to the States in the statute: the States were offered the choice of regulating activity according to federal standards or have state law preempted by federal regulation. "By [these] methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. . . . Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." *New York v. United States*, 112 S. Ct. at 2424.

As with the coercive "take title" provision in the Low-Level Radioactive Waste Policy Amendments Act of 1985, Public Law 99-240, 99 Stat. 1842, 42 U.S.C. § 2021b et seq., struck down by the Court in *New York v. United States*, 112 S. Ct. at 2408, IGRA's scheme unconstitutionally coerces States into participation in IGRA by holding out two impermissible choices, two coercive applications of federal law: "the State *shall* negotiate with the Indian tribe," 25 U.S.C. § 2710(d)(3)(A), or else face litigation in federal court, 25 U.S.C. § 2710(d)(7)(A) – with the additional coercive processes of forced negotiations, 25 U.S.C. § 2710(d)(7)(B)(iii); mediation, 25 U.S.C. § 2710(d)(7)(B)(iv); and ultimately, of imposition of a federally prescribed regulatory system which may even compel the state to create a system for regulating a game that is illegal within that state, 25 U.S.C. § 2710(d)(7)(B)(vii).

The Tenth Circuit, however, found IGRA does not run afoul of the Tenth Amendment because it "merely directs the state to negotiate in good faith, and stops well short of imposing a requirement on the states to enact or enforce a federal regulatory program, . . . " *Ponca Tribe*, 37 F.3d at 1434. The court likened this to "encouragement," not a mandate, to achieve "cooperative rulemaking" with the tribe. *Ibid.* In so saying, the Circuit Court overlooks the plain language and reality of IGRA. IGRA, by its own terms, imposes a requirement on the states to fashion, implement and enforce a regulatory program which the federal government refuses to do itself. This constitutes a direct interference with the states' sovereign reserved powers to contract, *United States v. Bekins*, 304 U.S. 27 (1938), in violation of the Tenth Amendment. It is a direct commandment to the states to engage in a regulatory

process or face the penalty of being hauled into federal court.[6]

The Tenth Circuit also ignores the "alternative" faced by a state if, for any reason, a state is accused of lack of good faith in negotiations. The history of this and the other cases before this Court illustrates the reality of IGRA. In each of the cases before this Court from the Ninth, Tenth and Eleventh Circuits, Indian tribes demanded the states negotiate for casino gambling activities that were criminally prohibited by the states. When the states, in good faith reliance upon the language of IGRA and their legal interpretation of it, refused to negotiate for illegal gaming activities, tribes brought suit, claiming the states were negotiating in bad faith. Had the states not brought constitutional defenses, they would be subject to court-ordered continuation of negotiations, court-ordered mediation and/or a submission of a mediator's selection of a last best offer compact to the Secretary of Interior. 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). If the matter reaches the Secretary, the Secretary must prescribe procedures consistent with the compact selected by the mediator, including, presumably, regulatory obligations placed upon the state. The state must then countenance

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[6] Additionally, if IGRA only "encourages" "cooperative rulemaking," and compliance with IGRA's good faith negotiation provisions is truly voluntary, then there is no Article III "case or controversy" in IGRA cases. If the Governors and the States do not negotiate in a voluntary arrangement, that is the end of the matter – there is no controversy for the court to adjudicate, no need for orders to negotiate and mediate, and no reason for Article III courts to declare the rights of tribes to negotiate with an unwilling partner. The entire basis of the court's jurisdiction is the existence of a case or controversy over a legal *duty* purportedly established by IGRA. If there is no duty, and the state's participation under IGRA is voluntary, the federal courts have no jurisdiction to hear these cases.

gaming activities, procedures, locations and facilities that may run contrary to the state's public policy or negotiating position.

What the Tenth Circuit calls a "default provision," then, is no "choice" for the States. The State's mere "choosing" to not negotiate must necessarily result in a court finding that the State is *in bad faith* before the mediational procedures ensue to the Tribes' benefit. Then, the State must ignore at its peril a court order to negotiate within a 60-day period. *States submitting themselves to being adjudged to be in bad faith and ignoring federal court orders at their own peril is not an acceptable means for appropriate decision-making on major matters of public policy.* This is coercion at its worst.

In sum, the States did not authorize Congress to *impose* upon them responsibility for determining the conditions under which casino gambling will be conducted on Indian lands within the State. Congress may either regulate such gambling directly, or Congress may permit the tribes to regulate such gambling exclusively; within either option, Congress may *invite* the States to undertake regulation of the activity in lieu of direct federal or tribal regulation. Such a scheme ensures the electoral accountability of federal and state officials, as the case may be, for the decisions made concerning the regulation of casino gambling on Indian lands. But Congress may not shield itself and federal officials from accountability for the conduct of casino gambling on Indian lands by making state officials responsible for fashioning the regulatory scheme – under threat of suit by Indian tribes who have no accountability to the state electorate.

The States are presented with a perplexing and unpalatable set of conditions: if the Tenth Circuit ruling is upheld, states will continue to be subjected to lawsuits by

Indian tribes they may not sue themselves, which lawsuits are solely to compel the states to perform acts that are not within their scope of affairs and which are wholly within the scope of the federal government's plenary powers. Because subjecting the States to suit by Indian tribes in federal court is not essential to the power of the Congress to provide for Indian gaming, Congress has no power to abrogate the state's Eleventh Amendment immunity. Under the Tenth Circuit's reasoning that any plenary power in the Congress gives rise to a power to abrogate Eleventh Amendment immunity, a constitutional wall has been reduced to a statutory hurdle and the Eleventh Amendment is rendered superfluous.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari filed by the State of Oklahoma should be granted.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1995

THE STATE OF OKLAHOMA,

Petitioner,

vs.

PONCA TRIBE OF OKLAHOMA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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RESPONDENT'S SUPPLEMENTAL BRIEF

INTRODUCTION:

On March 27, 1996 this Court entered its decision in *Seminole Tribe of Florida v. Florida*, No. 94-12 (March 27, 1996). Therein, this Court held that Congress did not have the power under the United States Constitution, pursuant to its plenary authority over Indian commerce, to abrogate the States' Eleventh Amendment sovereign immunity. As a result, this Court impliedly, if not actually, further held that Congress' clearly intended attempt to abrogate the States' Eleventh Amendment sovereign immunity and thereby make the States subject to the jurisdiction of the federal courts in suits brought by Indian Tribes under the Indian Gaming Regulatory Act, 25 U.S.C. §2701 *et seq.* ("IGRA"), was unconstitutional.

Currently pending before this Court is the petition for a writ of certiorari of Petitioner State of Oklahoma from the decision in *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994). Therein, the Tenth Circuit held that Congress did have the power to abrogate the States' sovereign immunity in suits brought by the Indian Tribes under IGRA. Pursuant to Rule 15.8, Respondent Ponca Tribe submits this supplemental brief to discuss the impact of the Court's decision in *Seminole Tribe* on Petitioner Oklahoma's pending petition for a writ of certiorari.

This Court's decision in *Seminole Tribe* has answered the question of the applicability of the Eleventh Amendment to the suit brought by the Ponca Tribe pursuant to §2710(d)(7) of IGRA, 25 U.S.C. §2710(d)(7). It has not, however, answered the question of whether the tribal suit

provision is severable from the remaining remedy provisions of IGRA, nor does it directly address the proper interpretation of those provisions in the absence of the tribal suit provision.

The severability and remedies questions are fairly subsumed within the original Question (2(e)) here presented by Petitioner State of Oklahoma. They are, moreover, squarely presented in the cross-petition filed by the State of Florida in No. 94-219, *Florida v. Seminole Tribe*, also currently pending before this Court. Direct and immediate answers to these questions will greatly aid the lower courts in these and many other pending cases. Therefore, the Court ought either to grant review of that portion of Petitioner Oklahoma's petition here which raises those questions, or grant review of the State of Florida's cross-petition in *Florida v. Seminole Tribe*, and reserve decision on the State of Oklahoma's petition until the Court resolves the issues of severability and remedies in that case.

Whether the Court issues a limited grant of review here or grants review in *Florida v. Seminole Tribe*, it has already indirectly indicated the proper outcome by the reasoning of its decision in *Seminole Tribe v. Florida*, as the following discussion will show. Accordingly, it may be appropriate for the Court to issue a decision deciding the severability and remedy interpretation questions summarily, pursuant to Rule 16.1, rather than engaging in full briefing and argument.

PART I: SEVERABILITY

In the briefing of the issue before the Tenth Circuit, the Ponca Tribe of Oklahoma argued that should the court find that Congress' attempt to abrogate the States' Eleventh Amendment sovereign immunity was unconstitutional, then the Tenth Circuit was required by Supreme Court decision and the severability clause provided for in IGRA, 25 U.S.C. §2721, to sever the unconstitutional provisions from the act. Because the Tenth Circuit found that Congress had the power to abrogate the States' sovereign immunity, the Tenth Circuit did not address the Ponca Tribe's argument.

This Court considered the severability of constitutional and unconstitutional legislation in *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678 (1987). Therein, the Court stated:

> " '[A] court should refrain from invalidating more of the statute than is necessary. . . . '[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare and to maintain the act in so far as it is valid.' " [citations omitted]. The standard for determining the severability of an unconstitutional provision is well established: 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.' [citations omitted].
>
> Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the

> legislation is incapable of functioning independently. [citations omitted]."
> *Id.* at p. 684.

Congress has plenary authority over Indian affairs and Indian commerce. U.S. Const. art. I, §8, cl. 3; No. 94-12, Slip op. at 17. Recognizing that Indian gaming is a means for the Indian Tribes to promote economic development, self-sufficiency, and strong Tribal governments, Congress enacted IGRA to provide a statutory basis for the regulation of Indian gaming. 25 U.S.C. §2702. IGRA divides Indian gaming into three classes.[1] In order for an Indian Tribe to engage in Class III gaming, the Tribe must first attempt to enter into a gaming compact with the State in which it intends to conduct Class III gaming. 25 U.S.C. §2710(d)(1). However, although requiring the Tribe to seek to enter into a Class III gaming compact, Congress clearly did not intend that the States have a veto power over Indian gaming. Rather, if the Tribe and the State were unable to enter into a compact within 180 days of the date the Tribe first requested the State to enter into negotiations for a Class III gaming compact, Congress provided the Tribe with a remedy through filing a lawsuit against the State in the U.S. District Court. 25 U.S.C. §2710(d)(7)(A) and (B)(i). After the filing of the lawsuit, should the District Court determine the State had failed to negotiate in good faith with the Tribe for a Class III

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[1] Although Class III gaming is defined in IGRA as all forms of gaming that are not Class I or Class II gaming, 25 U.S.C. §2703(8), it is recognized that Class III gaming includes banking card games, casino type games and slot machines. No. 94-12, Slip op. at 2.

gaming compact, IGRA established a process finally resulting in the Tribe obtaining such a compact upon submission of a compact to, and approval by, the Secretary of the Interior. 25 U.S.C. §2710(d)(7)(B)(ii)-(D).

The State of Oklahoma's petition for a writ of certiorari requested this Court to review and reverse the Tenth Circuit's decision upholding Congress' power to abrogate the States' Eleventh Amendment sovereign immunity. This Court's decision in *Seminole Tribe* will likely reverse the Tenth Circuit's decision in *Ponca Tribe of Oklahoma*. In such case, pursuant to the severability clause in IGRA and the decision in *Brock*, this Court has the duty to sever the unconstitutional provisions of IGRA from the remainder of the act. Accordingly, Respondent Ponca Tribe respectfully submits this Court has two options:

1. To find that the provision for the States' involvement with Tribal Class III gaming is so inextricably interwoven with the Tribe's sole remedy under IGRA through suing the States in U.S. District Court that the provisions of IGRA relating to Class III gaming are entirely unconstitutional and to sever the Class III gaming provisions from the act. In regards to Class III gaming, the Tribes would be subject to the regulatory scheme that existed prior to the enactment of IGRA; or

2. Recognizing that if a State refused to negotiate in good faith with a Tribe for a Class III gaming compact and, after being sued by the Tribe in U.S. District Court, should the State continue to refuse to participate in the process, Congress provided in IGRA for the Tribe to obtain a Class III gaming compact by submitting

a compact to and having it approved by the Secretary of the Interior; to find that the provisions of IGRA relating to the participation of the States in Class III gaming are unconstitutional and to allow the Tribes to submit to, and obtain a Class III gaming compact upon approval by, the Secretary of the Interior.

PART II: THE SECRETARIAL REMEDY

In *Seminole Tribe,* this Court refused to apply the doctrine of *Ex parte Young* to enforce a Tribe's statutory right by a suit against a state officer because the Court found that Congress had prescribed a detailed remedial scheme for the enforcement of the Tribe's right to negotiate a compact. No. 94-12, Slip op. at 29-30. The Court found the end result of that scheme to be a "quite modest set of sanctions." *Id.,* at 30. If a State (a) refuses to negotiate in good faith, (b) refuses to conclude a compact within a 60-day period ordered by the court, and (c) refuses to accept the compact chosen by a mediator, the matter simply moves out of court and the Secretary of the Interior must prescribe procedures for Class III gaming by the Tribe. 25 U.S.C. §2710(d)(7)(B)(vii) (the "Secretarial Remedy").

Congress clearly has the authority to empower the Secretary to prescribe procedures governing Class III gaming on Tribal lands.[2] The Secretarial Remedy operates

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[2] "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some

independently of the flawed provisions of IGRA and also provides the ultimate remedy enacted by Congress. Even under the flawed provisions of the statute, if a State refuses to conclude a compact or to accept the mediator's decision, the matter goes to the Secretary and the court's remedial role ends.[3] The procedures are promulgated by the Secretary; they are not ordered by the court. The court does not dictate, instruct or in any way control the Secretary's promulgation of procedures. Instead, the Secretary is guided by the compact selected by the mediator, the provisions of IGRA and relevant provisions of the laws of the State. 25 U.S.C. §2710(d)(7)(B)(vii). If a State chooses to assert its Eleventh Amendment immunity against suit by a Tribe, that action should be construed to operate in the same manner as refusals at (a), (b) and (c), above under the statutory scheme – creating an impasse which can only be resolved by the Secretary. Operation of the Secretarial Remedy in these circumstances would subject the State to the same "modest set of sanctions" and relief

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authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes." No. 94-12, Slip op. at 17. The Department of the Interior promulgated guidelines for gaming both before and after the passage of IGRA, *See e.g.*, Ross Swimmer, Assistant Secretary for Indian Affairs, *Review of Bingo Management Contracts*, U.S. Dept. of Int. Memorandum (April 7, 1986); Ross Swimmer, Assistant Secretary for Indian Affairs, *Indian Gaming*, U. S. Dept. of Int. Memorandum (March 6, 1992).

[3] The Court recognized that the court's involvement *before* the Secretarial stage is very limited and the "only remedy" in which the court is involved is issuance of an order directing the State and the Tribe to conclude a compact within 60 days. No. 94-12, Slip op. at 30.

expressly contemplated by Congress. Alternatively, a State could consent to the jurisdiction of a federal court in a suit brought by a Tribe. The State has the power to choose the remedy.

Respondent Ponca Tribe respectfully submits that the Court has already implicitly found that the Secretarial Remedy survives; if it does not, the reasoning and thus the justification cited by the Court in declining to apply *Ex parte Young* would not exist. "Where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." No. 94-12, Slip op. at 29. If the Secretarial Remedy were not available, then the remedial scheme referred to by the Court would not, in fact, exist, and the Court's justification for declining to apply *Ex parte Young* would be illusory.

The Court has encouraged interpretation of constitutionally defective statutes in a manner which provides simple and equitable results. *Califano v. Westcott*, 443 U.S. 76, 93 (1979). The federal courts may draw from their broad powers in equity in fashioning the remedy. *Id.* Preservation of the Secretarial Remedy – which Congress has already expressly included in IGRA – requires only the recognition that, if a State refuses to consent to suit under the Eleventh Amendment, the Secretarial Remedy is available to a Tribe and is not dependent upon a consensual suit. This is exactly what the Eleventh Circuit decided in the decision of which the State of Florida seeks review in its cross-petition:

> "Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and *the tribe, pursuant to 25 U.S.C. §2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state.* (emphasis added). The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02."
> *Seminole Tribe*, 11 F.3d at 1029.

By preserving the Secretarial Remedy and affirming the Eleventh Circuit's decision in *Seminole Tribe*, this Court engages in the least intrusive judicial action and does not disturb the remedy Congress expressly enacted.

CONCLUSION

For all the foregoing reasons, this Court should now grant review of the State of Oklahoma's petition, limited to the questions of severability and remedy as discussed above. Alternatively, the Court should grant review of the State of Florida's cross-petition in *Florida v. Seminole Tribe*, No. 94-219, and withhold decision in the instant matter, pending resolution of that case. In either event, inasmuch as the recent decision in *Seminole Tribe v. Florida* foreshadows the answer to the severability and remedy questions, the Court may wish to answer them through a summary disposition pursuant to Rule 16.1.

Respectfully submitted,

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